

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-113

**XXXXXXXXXXXXX
XXXXXXXXXXXXX**

FINAL DECISION

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 Chair docketed the application on March 15, 2007, upon receipt of a completed application and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 29, 2007, is approved and 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 the officer evaluation report (OER) for the period June 1, 2004 to June 10, 2005 (disputed OER). The applicant further requested that he be placed back into consideration for assignment to graduate school. During the period covered by the disputed OER, the applicant was the commanding officer (CO) of a cutter. The disputed OER covers the second of his two year command assignment.

APPLICANT'S ALLEGATIONS

Disputed OER Marks and Comments

The applicant alleged the following comments and marks in the disputed OER are erroneous:

- In the Planning and Preparedness category (block 3a), the applicant disputed the mark of 3 and the following comments: "Poor planner, reactive vice pro active [sic], often controlled by events vice being prepared with a plan action." ". . . failed to administratively assign member when directed, inhibiting ability of ISC to handle continued medical care of member."

- In the Workplace Climate category (block 5e), the applicant disputed the mark of 3 supported by the following disputed comments: “Kept FN assigned to cutter months after being directed by D17 to ADASSIGN mbr for medical reasons, creating extra burden for the crew.” “Several minor human relations and work-life incidents on cutter indicative of low morale and lack of leadership role model.” “PO promotion delayed due to non-completion of enlisted marks.”
- In block 7 of the reporting officer’s comments, the applicant challenged the comment: “At my direction supervisor counselled [sic] [the applicant] Dec 04 to discuss strategies to resolve repeated Ready for Operations deficiencies . . .” “Failed to empower crew, weak oversight of XO & EPO.”
- In the Judgment (block 8b) and Responsibility (block 8c) categories, the applicant disputed the marks of 3 and the comments: “Failed to add freeboard painting in drydock package despite ole suggestion, sought funding after drydock commenced.” “Did not fully follow specific D17 guidance on boarding of fishing vessel, required D17 (ole) to rescind case package, write apology to fishing vessel owner and make amends with NMFS.
- In block 10, where the reporting officer evaluates the applicant’s potential, the applicant disputed the comment: “had difficulty keeping . . . the cutter’s material condition at an acceptable level.”
- In block 12¹ where the reporting officer compares the applicant with all other LTJGs he has known throughout his career, the applicant disputed his placement in the third lowest category, on the scale of 1 to 7 with 7 being the highest mark. The reporting officer described as a “Fair performer; recommended for increased responsibility.”

Applicant’s Arguments

In challenging the above comments and marks as erroneous, the applicant alleged that his supervisor, Commander (CDR) W was located 400 miles away from the applicant’s unit and spoke with the applicant approximately once a month. The applicant claimed that this lack of interaction and distance led to the alleged erroneous marks and comments.

With respect to the comment “Poor planner, reactive vice pro active [sic], often controlled by events vice being prepared with a plan of action,” the applicant stated that he was a good planner and offered as corroboration a statement from a chief petty officer who served as the engineering petty officer (EPO) from June 2004 to June 2005. The EPO stated that the applicant was a good planner and further stated:

If there was something to do, he would bring us all together to discuss the issue. He tried to ensure we knew what needed to be done and how we were going to get it done. However, with the mission we had to carry out, plans would be

¹ This is block 9 on the disputed OER.

established and implemented, then factors would change and we would have to change. It was impossible to account for or plan for all possible events that could come up on a mission. At times, we had to make adjustments to overcome obstacles.

Regarding the comment “. . . failed to administratively assign member when directed, inhibiting ability of ISC to handle continued medical care of member,” the applicant contended that he took all measures within his power to get a correct disposition for the injured crewmember. He stated that he coordinated with the Seventeenth District (D17) Personnel division in a timely and efficient manner, and although he explored administratively assigning the injured crewmember to another unit, it could not be accomplished because no unit could be found that would take the injured member. The applicant stated that it took time to resolve the issue of where the injured member would go and he indicated there was a possible problem with the funding source for it. He stated that during the period of resolution the injured member was actively engaged on the ship in his assigned billet. The applicant subsequently stated that he used the FN effectively to stand watches and as a watchstanding trainer and that without a realistic reassignment option he decided to utilize the member as best he could. The applicant also contended that the lengthy process in getting the applicant moved was primarily the result of poor coordination and communication between medical personnel and D17 and that he received little direction from them. He also stated that the situation was further complicated by the fact that the crewmember was aboard a cutter that was frequently underway due to mission requirements. He stated that he did all he could for the FN and blamed D17 for mishandling the situation.

In support of his contentions about his handling of the situation with the injured crewmember, the applicant submitted a statement from the cutter's ombudsman.² She stated the following:

During the time frame I assisted an injured crew member who was stationed on the cutter. This was a new member of the Coast Guard who had sustained a back injury. The Coast Guard was telling him that he was going to be separated due to his medical condition. Unfortunately the coordination and communication between medical personnel and [the] District was poor. He was getting little guidance and information from them. In particular, [the] District handled the situation poorly.

I know that [the applicant] was the CO of the cutter at the time. Based upon my involvement in the situation, I cannot see where solving the problem with the member was his entire fault. This issue was being handled by medical personnel and District. Granted, [the applicant] and LTJG [H] started the proceedings and maybe some blame lies there; however it quickly evolved into a situation that was out of [the applicant's] hands to get a resolution.

² The applicant also submitted a statement from his attorney summarizing a conversation between the attorney and LT S about the applicant's handling of the FN situation. The attorney's reporting of what LT S told him constitutes hearsay.

The applicant alleged that the comment “Several minor human relations and work-life incidents on cutter indicative of low morale and lack of leadership role model” is erroneous. He pointed to the statement by the EPO that the applicant was a good CO who was new and assigned to a difficult situation. The applicant argued that there is no indication of what the minor human relation incidents were and that there were no complaints filed with the human relations officer. The minor issues, if any, “sound more like concerns that would arise from being frequently underway.”

The applicant stated that poor morale had nothing to do with him but was due to the relocation of the cutter from San Diego to Alaska and that the “austere conditions and the arduous mission requirements took a toll on the crew’s morale.” The applicant submitted a statement from a BM3 who served on the cutter from June 2003 through January 2005. She offered the following:

At the beginning of my time on the [cutter] the crew morale was not good. People were not happy because the cutter was supposed to be stationed out of San Diego but was moved to Alaska after the personnel were assigned to it. Towards the end of my time with [the applicant] the morale was better. [The applicant] did what he could to boost the crew’s morale.

I thought [the applicant] was a good leader. I thought that he explained things well to others. He took time to explain my job to me which helped me improve. He taught me new things about my job.

The EPO wrote that the “morale on the cutter was typical for a patrol boat with a high operations tempo. I do not think morale problems can be attributed to [the applicant].” This individual also noted that the cutter was relocated from San Diego to Alaska with a new inexperienced crew and that under the circumstances the applicant did “pretty well.”

In refuting the comment about poor morale the applicant also pointed to the following comment in the supervisor’s portion of the disputed OER, which allegedly contradicts the comment about the low morale:

Counseled 2 junior personnel on marriage entitlements & followed up to ensure rapid change to pay. Entered u/w watch rotation to allow member to take leave, making exception to standard “no leave” while u/w policy. Helped [member] with separation issues form new family as well as naturalization issues for spouse . . . Developed ship handling skills for u/w OODs through coaching and repetition of evolutions under various conditions. Mentored junior GM and helped him hone his skills in his critical independent duty billet.

The applicant concluded his argument about the minor work life incidents by stating such problems were not a result of any lack of leadership on his part, but rather they were vague unit problems that occurred despite his leadership.

The applicant challenged the comment “PO promotion delayed due to non-completion of enlisted marks” by stating that he completed all enlisted marks on time but they were lost in People Soft. He asserted that the lost marks were a computer error and not his fault.

The applicant stated that the reporting officer’s comment “At my direction supervisor counseled [the applicant] Dec 04 to discuss strategies to resolve repeated Ready for Operations deficiencies . . .” is erroneous. The applicant stated he was the one to repeatedly seek feedback on his performance and even went so far as to set up a temporary active duty (TAD) trip in order to see his supervisor and get feedback. He stated that during that meeting there was no discussion of any sub par performance and the supervisor told him that he was performing okay and that his marks were low because he was a new LT and a new CO.

The applicant contended that the reporting officer’s comment “Failed to empower crew, weak oversight of XO & EPO,” is erroneous. He argued that this comment conflicts with the supervisors comment that he “[d]elegated operations planning to the Ops Dept Head, and encouraged the EPO to become more involved in administrative aspects of the cutter.” The applicant stated that the XO had known personnel issues before his assignment to the cutter and although he tried to lead the XO through these issues, the XO would not heed the applicant’s guidance.

The applicant stated that the comment “Failed to add freeboard painting in drydock package despite ole suggestion, sought funding after drydock commenced” is inaccurate and unfair. The applicant stated that he had several meetings with MLC (Material Logistics Command) and he was told that the drydock was full and no new projects could be added. He stated that during this time, the drydock contract was tied up in litigation which prevented adding and addressing any new issues. He stated that once in drydock he was able to work out the issue of the freeboard painting and had it added to the package at a very good price. He argued that this set of circumstances had no adverse impact on his primary or secondary missions.

With respect to the comment that he “[d]id not fully follow specific D17 guidance on boarding of fishing vessel, required D17 (ole) to rescind case package, write apology to fishing vessel owner and make amends with NMFS,” the applicant stated that he followed the direction from D17 that was incorrect and that he documented this to his supervisor. He stated that he should not be held responsible for a D17 error.

The applicant stated that the comment “had difficulty keeping . . . the cutter’s material condition at an acceptable level” is erroneous. In support of his contention, the applicant again referenced the statement from the EPO, which stated the following in pertinent part:

The [cutter] is an old cutter. I think its condition is typical for that type of ship. While most ships have a maintenance augmentation team on board, ours was several hundred miles away . . . The maintenance that had to be accomplished was some of the most extensive that I have seen. The cutter’s condition was inherited, not created. Considering the inherited condition, the environmental impact of rough seas, and the climate . . . , I think that [the applicant] did a good job maintaining the cutter.

. . . Bottom line, the maintenance was done and the ship was operational, in better condition than when we got it.

The applicant also submitted a statement from a civilian who worked at the shipyard where the cutter was placed in dry dock. He stated that the cutter was in great shape and comparable to any cutter that he has worked on. He stated that he knew there were problems with the contract that covered the service to the cutter. "The freeboard painting had not been included in the original drydock package," and the applicant worked with this individual to have it included in the contract at a very good price. This individual stated that it is not uncommon to have additions to a contract.

The applicant concluded his arguments by stating that the marks of 3 were supported by comments that he has refuted. He further argued that once the comments supporting a mark are proven erroneous, the marks must be invalidated as well. He cited to Article 10.A.4.k.1. of the Personnel Manual.

The applicant alleged that his assignment to graduate school was terminated as a result of the disputed OER and he requested that the Board direct the Coast Guard to consider him for such an assignment.

Applicant's Other Performance

The applicant was promoted to LT, his current rank, on May 19, 2003. He also reported as the CO of the cutter on the same date. The applicant immediate prior OER was excellent. It covered the period from May 19, 2003 to May 31, 2004, the applicant's first year as CO of the cutter. He had marks of mostly 5s and no mark lower than a 4. In block 9 on the comparison scale, he received a mark in the middle block, which indicated that he was a good performer to whom tough, challenging assignment should be given.

The applicant also had above average OERs while serving the grades of Lieutenant (JG) and Ensign.

VIEWS OF THE COAST GUARD

On July 31, 2007, 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 to establish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a clear error and prejudicial violation of a statute or regulation, or alternatively, a misstatement of a significant hard fact. *Germano v. United States*, 26 Ct. Cl. 1446, 1460 (1992). The JAG stated that in proving his case, the applicant must overcome the presumption that his rating chain officials acted correctly, lawfully, and in good faith in making their evaluations under the officer evaluation system. *Arens v. United States*, 969 F.2d 1034, 1037 (1992). The JAG further stated that the applicant can rebut

the presumption by producing “cogent and clearly convincing evidence.” *Muse v. United States*, 21 Cl. Ct. 592, 602 (1990).

The JAG stated that in support of his arguments that the disputed OER contains erroneous comments and marks, the applicant provided statements from his former subordinates and others whom he had professional dealings with during the reporting period of the OER in dispute. The JAG stated that while those who submitted statements in support of the applicant’s case are welcome to express their opinions of his performance, the responsibility for preparing an OER rests with the rating chain. The JAG noted that each member of the rating chain had submitted statements affirming that the OER accurately reflected the applicant’s performance for the period under review.

The JAG adopted the comments from Commander, Coast Guard Personnel Command (CGPC) as part of the advisory opinion. CGPC offered the following:

Based on the record, the rating chain carried out its duties in accordance with policy . . . There is no evidence that indicates the rating chain erred during the preparation, review or submission of the applicant’s disputed OER. The comments and marks are well supported and well documented for the period of the disputed OER . . .

Coast Guard policy required that all officers be evaluated in an accurate, fair and objective manner and that an officer’s performance be measured against established performance and character standards . . . The rating chain clearly did so and refuted the applicant’s allegations of an inaccurate and unwarranted evaluation through their detailed and well supported declarations . . .

In summary, the rating chain carried out its responsibilities and submitted the applicant’s disputed OER in accordance with the Coast Guard Personnel Manual. They were in the best position to observe the applicant’s performance and provide a fair, accurate, and objective OER. There is no basis for removing the applicant’s OER from his record. No other relief is warranted in this case.

The Coast Guard obtained declarations under the penalty of perjury from the supervisor, reporting officer, and reviewer.

1. Along with his declaration, the supervisor provided notes that he taken during the applicant’s tenure as CO and as well as other documentation obtained during the reporting period, which included a letter from a crewmember’s spouse to a chaplain. The supervisor stated that the evaluation of the applicant’s performance in the disputed OER is accurate and the applicant has presented nothing to challenge it except for allegations that the comments are erroneous. He stated that the applicant took command of the cutter on May 19, 2003, and therefore the disputed OER covered the second and last year of his assignment as CO.

The supervisor stated that the applicant simply failed to prepare. In this regard, he noted that the applicant barely passed a ready for operations visit in August 2004 and that in May 2005

the applicant's cutter completely failed the inspection. The supervisor noted some of the discrepancies found during the August 2004 inspection, as follows: oil in the bilges, training records were not in order, cutter manuals were not updated to even reflect the new homeport, machinery space fire doctrine was not updated, and rust on the hull. The supervisor stated that the failure of the applicant's cutter was only 1 of 2 he witnessed in over 24 such inspections during his Alaskan tour.

With respect to the reassignment of the FN, the supervisor stated, "after being directed to administratively assign FN [S] ashore, [the applicant] continued to delay until intervention by the D17 staff . . . FN [S] was not assigned ashore until [January 13, 2005] at ISC Seattle, three months after [the applicant] was directed to do so." The supervisor stated that the applicant's decision to leave the FN ashore, at home, with no supervision for weeks at a time and to not temporarily assign him to another command was stunning. The supervisor submitted notes from an October 13, 2004 meeting about the FN that included the applicant, the supervisor, and other D17 personnel. The notes of that meeting show that an assignment had been identified for the FN and that when the FN was onboard the cutter and stood watches he required a shadow in case of emergencies.

The supervisor stated that the applicant's claim that he inherited poor morale is bogus. He noted that during the period, he received comments from a master chief petty officer about morale on the cutter, a letter to a chaplain written by a spouse about the lack of morale and general climate onboard the cutter, and an email from a civilian contracting officer.

With respect to the applicant's claim that he entered marks for the enlisted member whose promotion was delayed but there was a problem with People Soft, the supervisor stated that the computer program did not lose the marks because it was broken and the marks were never entered. He stated "There are many other computers available [and] that [the applicant] simply had to log into the evaluation system from a different location." He stated that the D17 Command Master Chief got involved and had the marks entered from another location so the member could advance. "The [applicant] could have done the same thing but his lack of initiative and apathy resulted in the delay."

The supervisor stated that he counseled the applicant in December 2004 at the CO's conference which was a mandatory TAD trip for all COs, and he disagreed with the applicant that the trip was arranged by the applicant for feedback, as the applicant contended. He stated that he counseled the applicant on the ready for operation deficiencies. "It was during this counseling session that I told [the applicant] that the Admiral had suggested he be relieved for cause back in October." The supervisor stated that he told the applicant that he thought the applicant was a capable officer and that he did not see the need to relieve him. According to the supervisor, his comments in this regard "does not translate to high marks on an OER, all it means is that [the applicant] was not relieved for cause."

The supervisor stated that although the applicant delegated often and well, he did not empower his senior leadership. In this regard, he stated that he saw a crew that was afraid to act without [the applicant's] direction or permission, which is totally contrary to empowerment.

The supervisor stated that he was not aware of any problems with the applicant's XO and that the applicant never requested that either his prior or his then-current XO be relieved or reassigned.

With respect to freeboard painting, the supervisor stated that the applicant has his facts wrong. On this issue, the supervisor further stated:

Additional items could not be added to his drydock package at MLC expense. D17 maintained a separate funding account for WPB maintenance. [The applicant] was told how to access that funding to add this item to his package at D17 expense but he didn't care to listen or access the funding. Once [the applicant] arrived at drydock, the contractor asked about freeboard painting. [The applicant] called D17 and we once again walked him through the process and paid for the painting. This lack of attention was evident throughout [the applicant's] tour and speaks to his lack of initiative . . .

With respect to the 3 in judgment, the supervisor stated that the mark is supported by the following poor decisions made by the applicant: leaving the FN ashore unsupervised with no tasks, being unprepared for RFOs, allowing his XO to depart on leave while he was TAD (a violation of D17 policy), and causing severe wake damage to several vessels due to excessive speed.

Regarding the applicant's statement that he received incorrect direction from D17 with respect to boarding the fishing vessel and should not be held responsible for a D17 error, the supervisor stated that the question is not whether the guidance is good or bad but whether the applicant followed the guidance given to him. The supervisor stated that the applicant did not follow the guidance as directed and he did not provide any specifics to the contrary.

With respect to the condition of the cutter, the supervisor stated that there were two other cutters in the same area and neither had the maintenance issues that that the applicant alleged were created by the distance from the maintenance team, by the rough seas, and by the climate. He stated that the applicant's cutter was the newest of the three. The supervisor offered a list of maintenance issues with respect to the applicant's cutter that could have been easily addressed with preventive maintenance. He also submitted a copy of a May 27, 2005 message from D17 to the applicant's cutter stating that the cutter was not ready for sea. Among the issues found during the inspection was the cleanliness of the cutter, which according to D17 was not up to Coast Guard standards.

The supervisor stated that the applicant did not do a fantastic job as CO, as suggested. He stated that in his opinion, the mark given on the comparison scale, describing his as a fair performer who is recommended for increased responsibility, is generous based on his overall performance. The supervisor further stated:

As the [CO] of a USCG cutter, [the applicant was] ultimately responsible for the actions of [his] unit, the actions of the people onboard, the maintenance of the cutter, and the health of the crew. As stated in the disputed OER, [the applicant]

often seeks to shift blame to others and appears unable to grasp the responsibility he had while serving as [CO] . . .

2. The reporting officer wrote a declaration under penalty of perjury that the disputed OER is a balanced, fair, accurate, and error free evaluation of the applicant's performance for the period. The reporting officer stated that the OER comment that the applicant failed to empower and oversee his crew is not in error. He stated that while the applicant may have empowered the crew occasionally, he did not ensure that they were managing things correctly. The reporting officer stated that although the applicant claimed that the shortcomings were the fault of his subordinates, his claim that inferior people were assigned to his cutter could not be substantiated. The reporting officer further stated:

Freeboard painting—This comment is accurate and fair . . . [The applicant] did get the painting added to the drydock package and funding for the work from [his supervisor] and myself, but not until after the cutter was in drydock as stated. The drydock package was completed over 30 days prior to entering drydock. He failed to get the freeboard painting added to the contract as expected and communicated by D17 to him prior to going to the shipyard, [which] is what the OER addresses. A “very good price” and no adverse impact have no bearing on the validity of the OER comment.

D17 Guidance—This statement is accurate in my opinion, [the supervisor] briefed me on this incident . . . We did write an apology to the fishing vessel owner. The local NMFS official acknowledged and accepted our rescinding of the case package and thanked us for our apology to the owner.

The Cutter's Condition—This statement is accurate and fair. This statement addresses unit level cleanliness and other preventative maintenance aspects of material condition that [the applicant] as [CO] was solely responsible for. Material condition items addressed by a shipyard are largely material condition items beyond ships force capability, knowledge or training to perform. [The applicant] may have inherited some poor material conditions, but this OER covers his second full year in command and any inherited conditions that were within the ship's force capability to correct should have long since been corrected but many were not and had been pointed out to him repeatedly. The “remarkable” maintenance [the cutter] did accomplish was infrequent. This statement accurately states he failed to maintain the cutter's material condition at an acceptable level.

Comparison Scale—[The applicant] was a fair performer compared to the other LTs I have known in my career. I have evaluated 18 LTs as Reporting Officer in my career.

3. The reviewer, who at the time was the Commander of D17, wrote that he visited all units under his command, including the applicant's. He stated that based upon his notes and recollection of the time in question, the applicant was less than thorough in his planning for

operations, deployments, and shipyard period. He stated that the applicant did not communicate plans to his crew or prepare alternative backup plans. He noted that a lack of preparation was clearly evident in the cutters repeated deficiencies in meeting its Ready for Operations requirements and stated that the applicant failed such inspections on two occasions in May 2005. He offered the following example of the lack of proper planning by the applicant:

I was escorting the visiting Russian General from the Northwest Border Guard District in Kamchatka . . . During this official visit I took the Russian delegation and the General to Valdez. One of our stops was to visit the [applicant's cutter]. The cutter's mission was to sail around the port of Valdez while describing the operations and security zone requirements. The day of the visit was a beautiful fall day, but it was obvious to the entire delegation that the cutter was not prepared for the day's events. [The applicant] was not ready to explain the waterfront operations or the operation of the security zone. He stumbled through a brief explanation, and was not prepared to have his XO handle the underway responsibilities of operating the cutter. During the entire time, he kept the Con while at the same time attempting to give the briefing of the port. This did not flow well. This was clearly a lack of planning and preparation for what was a high profile international visit. While the visit was completed without incident, [the applicant] did not demonstrate good planning and preparation.

With respect to the comment on the applicant's failure to reassign the sick crewmember, the Reviewer wrote that it is incorrect that the applicant did not have the authority to single handedly reassign the member. In this regard, he stated that a CO has the responsibility and authority to work with shore units to temporarily assign individuals to a shore command because he or she is unable to sail with the cutter. He stated that it was a failure of leadership on the applicant's part to allow the sick crewmember to be left ashore taking medication alone, with no one to report to, while the cutter is at sea or deployed for extended periods of time.

The reviewer stated that while morale is not totally a reflection of the CO, it is significantly affected by the attitude and leadership of the CO. He stated that there is no single factor that is more important to the overall unit's morale than the CO. "In the [applicant's cutter's] situation, certainly the relocation was a factor, but the aloof, arrogant attitude of the CO had a significant negative impact on the crew's morale."

With respect to the freeboard painting issue, the reviewer corroborated the supervisor's statement in this regard. The reviewer stated that the applicant's "leadership and performance was . . . not satisfactory and not to the level that is expected of our [CO's]. I consider the OER for this period . . . to be a fair and accurate assessment of his performance."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 27, 2007, the Board received the applicant's reply to the views of the Coast Guard. He offered the following:

[The applicant's] application . . . was supported with statements from four different individuals who worked with him on a daily basis or who were personally involved in the matters on which they commented. His raters on the other hand, were hundred of miles away and saw [the applicant] maybe two times during the disputed rating period. [The applicant] proved by a preponderance of the evidence that the disputed OER was erroneous.

The applicant disagreed with the JAG's statement that the presumption that the applicant's raters acted correctly, lawfully, and in good faith can only be rebutted by "cogent and clearly convincing evidence." The applicant stated that that standard only applies to a challenge of a military correction board decision in the Court of Federal Claims.

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. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by a "misstatement of significant hard fact," factors that "had no business being in the rating process," or a "clear and prejudicial violation of a statute or regulation."³ The Board begins its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁴

3. The applicant alleged that the disputed OER should be removed from his record because certain of the OER comments are erroneous and that such a finding by the Board would invalidate the marks of 3 that he received in the contested areas. However, for the reasons discussed below, the Board finds that the applicant has failed to prove that either the comments or marks are erroneous or unjust.

4. One of the applicant's major arguments is that he was geographically separated from his rating chain and therefore they were not knowledgeable enough about his performance to accurately evaluate it. There is nothing in the Personnel Manual that says that the members of the rating chain must be physically co-located with the reported-on officer. In fact, Articles 10.A.4.c.4.d. and 10.A.4.c.7.d. of the Personnel Manual state that the supervisor and reporting officer shall draw on their observations, those of any secondary supervisors, and other information accumulated during the reporting period. Therefore, the supervisor and reporting officer's reliance on the inspection reports of the applicant's unit, reports obtained from other personnel, their own observations during command visits, and other reports were appropriate for

³ *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

⁴ 33 C.F.R. § 52.24(b).

use in evaluating the applicant's performance. Moreover, the then Secretary's Delegate disagreed with the Board's finding in Docket No. 43-91 that that applicant has suffered an injustice because his rating chain had personally observed him only one or two times over the course of a year, although she granted relief to that applicant on other grounds. With respect to minimal observation by a rating chain, the Secretary's Delegate wrote:

. . . I find that the Coast Guard Evaluation Branch was correct in contending that the supervisor and reporting officer could in substantial part measure the applicant's performance and the "health" of the unit through their own visit, inspection by others supervising the station, and routine administrative correspondence and message traffic. There is no specific requirement for the raters to directly observe the reported-on officer for any extended length of time.

Similarly, I have found no judicially-imposed requirement for on-site personal observation by a rater of a member in a remote location. Indeed, in *Boyd v. United States*, 207 Ct. Cl. 1 (1975), the court accepted an Air Force procedure in which raters obtained evaluation letters from an official most familiar with the performance of the officer being rated, rather than personally observing the member. There, the member was located at an Air Force base in Kansas; his rater and deputy chief was at Langley AFB, Virginia, and did not visit him. While the governing personnel regulations of the Air Force differ from the Coast Guard's, the facts here also differ in that [that applicant's] raters had directly observed him on several separate occasions.

In light of the above, even if the applicant's rating chain did not visit him on a frequent basis, their evaluation of his performance must be accepted unless it is proven to be inaccurate.

5. The applicant has failed to prove that the comment "Poor planner, reactive vice pro active [sic], often controlled by events vice being prepared with a plan of action." was erroneous. The applicant offered the opinion of his then-EPO to prove that he was a good planner who tried to ensure that the crew knew what was needed and how to get it done. The EPO further stated that although plans were established and implemented by the applicant, unexpected events would necessitate changes. However, the EPO, a chief petty officer, was not responsible for evaluating the applicant's performance or for ensuring that the cutter was ready operationally. In contrast to the EPO's statement, all three members of the rating chain stated under penalty of perjury that the applicant was poor at planning and offered evidence in corroboration of this comment. For instance, all three pointed out that the applicant barely passed a ready for operation inspection (RFO) in August 2004 and failed this inspection completely in May 2005. The fact that the applicant failed the inspection in May 2005 after barely passing in May 2004 shows either poor planning and preparedness or a severe lack of understanding of his responsibility as CO. The rating chain was charged with assessing the applicant's planning and preparedness, and in their judgment his performance in this area was below average. The applicant has failed to prove that the supervisor's comment in this regard was erroneous.

6. The applicant has also failed to prove that the comment "failed to administratively assign member when directed, inhibiting ability of ISC to handle continued medical care of

member” is inaccurate. The supervisor wrote that the applicant did not reassign the sick FN until three months after being directed to do so. While the applicant offered several explanations why he failed to reassign the FN as directed, he does not dispute the fact that he did not do so promptly. He submitted a statement from the unit’s ombudsman. However her opinion that the blame for the FN’s situation should be shared between the applicant and D17 does not prove that the applicant acted to reassign the FN as directed by his superiors; nor does it disprove the rating chains assessment that his failure to do so inhibited the ISC’s ability to handle his medical care. There is no evidence that the ombudsman was privy to all conversations between the applicant and his rating chain and there is no indication that she attended the October 2004 meeting in which the FN situation was discussed. Nor did she state how often she interacted with the injured member during this period. She offered her opinion that blame should be shared (not that the applicant was blameless) by both the applicant and D17, but her opinion does not prove that the comment is inaccurate and it is not proof that the applicant’s actions in this regard were those expected of a CO.

7. The applicant failed to prove that the following comments in the Workplace Climate category of the disputed OER are inaccurate: “Kept FN assigned to cutter months after being directed by D17 to ADASSIGN mbr for medical reasons, creating extra burden for the crew.” “Several minor human relations and work-life incidents on cutter indicative of low morale and lack of leadership role model.” “PO promotion delayed due to non-completions of enlisted marks.”

a. The applicant’s failure to reassign the sick member is discussed in Finding 6. The applicant denied that keeping the injured member assigned to the cutter was a burden to the crew. In this regard, the applicant stated that during this period the FN was actively engaged on the ship in his assigned billet. Contrarily, the supervisor and reviewer stated that the FN was left ashore for extended periods without supervision while the cutter was on patrol. Keeping the sick FN assigned to the cutter and leaving him ashore while the cutter was on patrol, without a replacement, must have created an extra burden for the crew because some other member had to cover his assignment. The applicant does not deny that the FN was left ashore during patrols. In addition, if the applicant suffered a back injury as stated by the ombudsman, it is difficult to see how keeping him assigned to the cutter would not have been a burden to the crew. In this regard, the supervisor’s submission of notes from the October 2004 meeting indicates that when the FN stood watches he required a shadow in case of emergencies. Therefore, the applicant has not shown the comment to be inaccurate or unjust.

b. The applicant challenged the OER statement “Several minor human relations and work-life incidents on cutter indicative of low morale and lack of leadership role model.” The applicant stated that the supervisor does not identify the minor incidents that were indicative of low morale. However, the supervisor noted in his declaration that he had received comments on the cutter’s low morale from a master chief petty officer, a letter to the chaplain written by a spouse, and an email from a contractor. The applicant acknowledged that low morale existed because he blamed it on the relocation of the cutter to Alaska from San Diego, the austere conditions in Alaska, and the arduous mission requirements. Even if the Board were to find the disputed comment about minor human relations and work-life incidents to be vague, the disputed OER could be corrected to remove it without removing the entire OER from the record, and the 3

in the Workplace climate category would remain because it would be supported by the comment about the negative impact on the crew of leaving the sick FN assigned to the cutter after D17 directed his removal. Further, even if the Board were to find the comment to be in error due to vagueness, such an error would not necessarily require corrective action in light of the below average marks of 3 and the unfavorable comments in the planning and preparedness, judgment, and responsibility categories, as well as the mark left of center on the comparison scale and the negative assessment of the applicant's potential for future command assignments. As CO, the morale of the crew was the applicant's responsibility and a proper subject of comment by the rating chain.

The applicant further argued that the following supervisor's comment in section 5 of the OER contradicts the comment about poor morale:

Counseled 2 junior personnel on marriage entitlements 7 followed up to ensure rapid change to pay. Entered u/w watch rotation to allow member to take leave, making exception to standard "no leave" while u/w policy. Helped [member] with separation issues form new family as well as naturalization issues for spouse . . . Developed ship handling skills for u/w OODs through coaching and repetition of evolutions under various conditions. Mentored junior GM and helped him hone his skills in his critical independent duty billet.

The Board finds the above comment speaks to the applicant's abilities in categories of looking out for others and developing and directing others more than it does to the issue of morale. While the comment about the incidents leading to low morale could have been more precise, the Board finds it is sufficiently succinct to inform the applicant of the problems and the applicant has not shown the comment to be inaccurate

c. The applicant has not proven that the comment "PO promotion delayed due to non-completion of enlisted marks" is inaccurate. His explanation that he entered the marks but they were lost in People Soft is directly rebutted by the supervisor who wrote that the marks were never entered by the applicant because the computer assigned to him was broken and he failed to make use of other available computers. According to the supervisor, the enlisted marks were entered by the D17 master chief and the enlisted member was subsequently advanced.

8. The applicant challenged the following reporting officer's comment but failed to prove that it was erroneous: "At my direction supervisor counseled [the applicant] Dec 04 to discuss strategies to resolve repeated Ready for Operations deficiencies . . ." Both, the supervisor and reporting officer stated that the supervisor counseled the applicant, particularly on the RFO deficiencies at the CO's conference, in which attendance was mandatory. The supervisor wrote that he told the applicant that he thought he was a capable officer even though the Admiral had suggested his relief. However, the supervisor stated that his comment to the applicant does not mean that he was entitled higher marks than received, only that he was not relieved of command. Therefore, the applicant argument that there was no discussion of sub-par performance during the supervisor's counseling session is without merit, especially with the applicant barely having passed the RFO in August 2004.

9. The applicant challenged the reporting officer's comment "Failed to empower crew, weak oversight of XO & EPO. The applicant argued that the reporting officer's comment is contradicted by the supervisor's comment that he "[d]elegated operations planning to the Ops Dept Head, and encouraged the EPO to become more involved in administrative aspects of the cutter." OER's are divided into three parts, supervisor's portion, the reporting officer's portion, and the reviewer's section. Each is entitled to make their own independent assessment of the applicant's performance.⁵ Therefore, even if the two comments can be read somewhat differently, that is not necessarily error. In this case, the Board finds that the applicant may have delegated and encouraged his XO and EPO, but that does not mean the he empowered them to take action of their own volition or that he provided strong oversight of them.

10. The Board finds the comment "Failed to add freeboard painting in drydock package despite ole suggestion, sought funding after drydock commenced" is not erroneous. Both the supervisor and reporting officer stated that the applicant failed to add this item to his drydock package prior to arriving at drydock despite being told to do so. The applicant offered several explanations why this was not accomplished until he reached drydock, but he has not proven that the comment is inaccurate.

11. The applicant alleged that the comment "Did not fully follow specific D17 guidance on boarding of fishing vessel, required D17 (ole) to rescind case package, write apology to fishing vessel owner and make amends with NMFS is inaccurate because he did follow the guidance of D17, which was erroneous. Both the supervisor and reporting officer stated that the applicant failed to follow D17 guidance which required the issuance of an apology to a vessel owner. The applicant's statement is not sufficient to prove that he followed the advice of the rating chain in this regard; nor does he provide the Board with the actual guidance provided to him by D17 that was erroneous.

12. The applicant offered a statement from the EPO and a civilian drydock worker to prove that the comment that he "had difficulty keeping . . . the cutter's material condition at an acceptable level" is inaccurate. The EPO's statement that the cutter was old, that its condition was typical for that type of ship, that the condition of the cutter was inherited, and that the maintenance team was located hundreds of miles from the cutter, does not prove that the reporting officer's comment that the applicant had difficulty keeping the cutter's material condition at an acceptable level is erroneous. As the supervisor stated, even if the applicant inherited some of the material deficiencies with the cutter, the OER covers his second year as CO of the cutter and those inherited problems should have been cured long ago. According to a D17 email, even cleanliness was a problem with the cutter. A civilian drydock worker stated that the applicant's cutter was in great shape and comparable to others that he had helped to repair. However, this individual does not state what he meant by great shape; nor does he explain to the Board how many other ships of this type he had previously worked on. The EPO and the drydock worker provided their opinions about maintenance of the applicant's cutter, but it was the responsibility of the rating chain to make decisions and judgments about whether this

⁵ Article 10.A.2.a. of the Personnel Manual states that "the rating chain provides as assessment of an officer's performance and value to the Coast Guard through a system of multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting."

applicant has performed his duties in an acceptable manner. The applicant has not shown by a preponderance of the evidence that the comment is in error.

13. The various marks of 3 and supporting comments are evidence that the members of the rating chain determined that some areas of the applicant's performance were below average.⁶ The Board will not modify an OER or remove it from the record unless the applicant provides persuasive evidence that it is in error. The evidence offered by the applicant in this case does not persuade the Board that any of the disputed comments are in error or unjust. Moreover, the Board finds particularly persuasive that each member of the rating chain submitted declarations under penalty of perjury reaffirming their evaluation of the applicant's performance in the disputed OER. Further, the Board notes that the record does not indicate that the applicant submitted a reply to the disputed OER under Article 10.A.4.g. of the Personnel Manual. While the Board does not base its decision on whether to grant or deny relief on an applicant's failure to submit an OER reply, it is one factor the Board takes into consideration during its deliberations.

14. The applicant made note of his other excellent performance. However, prior excellent performance is not proof that the applicant's performed in a similar manner during the period under review. Each period of performance must stand on its own merits.

15. The applicant has failed to prove that the disputed marks of 3 and comments are inaccurate. Neither they nor the OER will be removed from the applicant's military record. In addition, the Board finds that the comparison scale mark in block 9 is the reporting officer's evaluation of the applicant compared to other LTs he has known during his career. The applicant has not demonstrated that the block 9 mark is anything except the honest opinion of the reporting officer.

16. The applicant has failed to prove error or injustice in this case and his request for relief should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

⁶ Marks range from a low of 1 to a high of 7. Marks of 4 are considered average grades.

ORDER

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

George J. Jordan

James E. McLeod

Dorothy J. Ulmer