

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-038

FINAL DECISION

ANDREWS, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 of the United States Code. It was commenced on December 9, 1997, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated November 19, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant is a xxxxxx who was discharged from the Coast Guard on May 1, 199x, and is now in the Coast Guard Reserve. He asked the Board to correct his record by expunging two officer evaluation reports (OERs) he received while on active duty. The disputed OERs, which cover the periods October 28, 199x, to July 27, 199x, and July 28, 199x, to January 31, 199x, would be replaced by OERs prepared "For Continuity Purposes Only."

The applicant also requested that the Board return him to active duty in the Coast Guard and remove from his record failures of selection¹ for promotion, which, he alleged, resulted from the presence of the two disputed OERs.

APPLICANT'S ALLEGATIONS

Allegations Concerning the Disputed OERs

¹ Although the applicant did not mention his first failure of selection, the Board assumes that he wishes it to be removed as well since the disputed OERs were in his record at the time.

The applicant alleged that the first disputed OER should be removed because the executive officer (XO)² of his ship, the Coast Guard cutter *Xxxx*, employed an “unfair discriminatory evaluation practice” and because the comments in the OER “do not justify [the] marks assigned.” He alleged that, from his first day on board, he was “held to a position of ‘second class officer’” because he is [redacted nationality] and because he is not a graduate of the Coast Guard Academy. (The applicant is xxxxxxxxxxxxxxxxx.) He alleged that the ship’s Operations Officer (OO) told him that he would never be “at the same level [as] the ‘Academy’ graduates,” and that the XO told him that he “would never be able to compete with other officers on board.” He alleged that similar comments were made throughout his tour on the *Xxxx* in front of other officers and enlisted members. (Although he apparently sought affidavits from the OO and another officer, he did not submit any affidavits to the Board.) He said the other officers on board “were all white and ‘Academy’ graduates.”

The XO, the applicant alleged, “constantly” called him “less qualified” and “useless.” The insults were disguised as teasing, and he would have been “tagged as ‘sensitive’ and not a team player” if he had protested. “The Executive Officer’s comments . . . effectively created a biased poisoned environment from which I could not escape or appeal.” “The racist comments and demeanor from the Executive Officer were continuous, including making derogatory comments regarding non-Americans ([redacted nationalities], etc.) and other minorities during actual operations.”

The applicant also alleged that the XO had blocked his efforts to become a qualified officer of the deck (OOD), although the OO, other officers, and crew members “trusted and believed [him] to be fully qualified.” He cited the fact that he had qualified to serve as OOD soon after the XO departed the ship as evidence that the XO had blocked his progress.

The applicant alleged that six marks of 3³ on the first disputed OER are inaccurate and inconsistent with the comments. He stated that the XO’s “discriminatory practices were reflected in [his] evaluation.” The XO, who served as reporting officer on the first disputed OER, had ordered the OO, who served as the supervisor for the OER, to lower the marks and include negative comments. He also alleged that, when the OO told him this, he considered appealing the OER, but the OO said that the XO would

² The following abbreviations are used in this Final Decision to refer to the officers of the *Xxxx*: “XO” was the ship’s executive officer during the period of the first disputed OER. He served as the reporting officer for that OER.

“CO” was the ship’s commanding officer throughout the applicant’s tour. He served as the reviewer for the first disputed OER and as the reporting officer for the second disputed OER.

“OO” was the ship’s operations officer during the period of the first disputed OER. He served as the supervisor for that OER.

“XO2” was the ship’s executive officer during the period of the second disputed OER. She served as the supervisor for that OER.

³ Coast Guard officers are evaluated on a variety of characteristics on a scale of 1 to 7, with 7 being the best mark. A mark of 3 is below average.

make his life "hell" if he complained. Therefore, fear of reprisal from the XO stopped him from complaining.

The applicant alleged that the second disputed OER was an unjust "remnant" of the XO's influence on board the *Xxxx*. He stated that the environment was still "poisoned," and the XO's racist perceptions of him remained even after the XO departed.

Allegations Concerning the Applicant's Failures of Selection

The applicant failed of selection for in 199x and 199x. He alleged that the 199x selection board had "failed to notice [his] documented outstanding performance, potential for future duties, [and the] strong endorsement for selection [in later OERs], and [had] unjustly concentrated on [the] negative OER[s]." He stated that he did not reply to or protest the OERs earlier because his supervisor and other superior officers had indicated that he "should have no problem being selected to xxx" given his later OERs. They also told him that "any attempt to appeal [his] marks would seem to the [selection] board as a 'desperate cry' to get selected with poor performance." Therefore, he alleged, he was unjustly passed over by a "system [that] concentrate[s] on reasons why not to promote people, rather than what has the person done to merit promotion and greater responsibilities."

To support his application, the applicant submitted a signed statement from the commander of the xxxxx Coast Guard District, dated December 2, 199x. In it the commander stated that the applicant "is one of my most valued officers," "highly motivated," "multi-talented," and "an outstanding role model for juniors as well as peers."

VIEWS OF THE COAST GUARD

On October 15, 1998, the Chief Counsel of the Coast Guard recommended that the Board dismiss the application for failure to exhaust administrative remedies or deny the applicant's request for relief for failure of proof.

The Chief Counsel urged the Board to dismiss the case because the applicant did not file a civil rights complaint. He alleged that the civil rights complaint process was "an administrative remedy available to [the applicant] to develop the necessary factual information for the record." He urged the Board not to consider the application until that "administrative remedy" had been exhausted. He stated that the authority to investigate discrimination complaints lies with the Office of Civil Rights, not with the BCMR. "[A]bsent a report of investigation conducted by competent authority, the Board lacks the record necessary for it to grant Applicant the relief he has requested" The Chief Counsel cited BCMR regulations and several precedent cases that require an applicant to exhaust all administrative remedies before applying to the Board. He did not cite any case in which an investigation by the Office of Civil Rights was determined to be an administrative remedy. The Chief Counsel also pointed out that, as his unit's civil rights officer, the applicant "knew or should have known how to report discrimination [and] the fact that reprisals are not tolerated in such circumstances."

Alternatively, the Chief Counsel argued that the Board should deny the applicant's request because of a lack of proof. The Chief Counsel stated that the "Applicant's allegations of discrimination against his Reporting Officer are uncorroborated and

unsubstantiated and would not constitute discrimination or a hostile work environment even if true.” He pointed out that, although the applicant alleged that the discriminatory acts happened in the presence of other officers and enlisted members, he “inexplicably fail[ed] to present a single witness statement.”

The Chief Counsel said that “[t]o establish that the OER is erroneous or unjust, the Applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation.” Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992). “[T]he fact that Applicant had better ratings before and after the disputed OER is of no legal moment or probative value as to rating periods covered by disputed reports.” In the absence of substantial proof, “rating officials are strongly presumed to have acted correctly, lawfully, and in good faith.” Arens v. United States, 969 F.2d 1034, 1037 (1992).

The Chief Counsel appended to his advisory opinions affidavits from the OO, the XO, the commanding officer of the Xxxx (CO), and the executive officer of the Xxxx for the second evaluation period (XO2).

Affidavit of the CO, the Commanding Officer of the Xxxx

The CO stated that he “never saw evidence of [discrimination against non-whites or non-Academy graduates] from [the XO] or anyone else in the wardroom, and [he] dispute[s] this claim completely.” He named two other officers on the Xxxx who were not Academy graduates. He explained that “[the XO] was demanding of the junior officers, as a result of his leadership style and the nature of the Executive Officer position. The important thing is, he was no more demanding of the Applicant than he was of the other junior officers on board”

The CO stated that he “reviewed each and every OER prepared on XXXX’[s] officers to ensure: marks were supported by narrative; rating chain marks and comments were not at odds with [his] own observations; and officers were evaluated against the standards on a consistent basis.” He “made it clear at all times that no one in the rating chain, including [himself], was to direct a junior member of the [rating] chain what marks were to be assigned or what comments were to be made.” After reviewing the disputed OERs, he stated that each mark of 3 was properly supported by the comments. In addition he stated that, although at first he had been very impressed with the applicant’s performance, “that initial impression faded as the shortcomings noted in the first [disputed] OER started to become apparent. In particular, his interpersonal skills were a clear weakness. . . . [H]is overall leadership style toward the crew tended to be overbearing and autocratic, . . . which [the CO] found surprising since the Applicant came from the enlisted ranks and would seem more likely to be empathetic in his dealings with subordinates.”

Regarding the applicant’s claim that the XO blocked his progress to qualify as OOD, the CO stated that he “consider[s] it highly unlikely, given the nature of the OOD

qualification process we employed on XXXX.” He explained that whether to allow an officer to sit before the qualification board is a collective decision made primarily by a ship’s operations officer and commanding officer. The XO could only have provided input. In addition, the CO attributed the applicant’s qualifying for OOD soon after the XO left the Xxxx to the fact that, before he left, the XO had arranged for the applicant to gain additional underway experience by performing several weeks of temporary duty on the Coast Guard cutter xxxx while the Xxxx was to be in port for a long duration. The CO denied the allegation of a cause-and-effect relationship between the XO’s departure and the applicant’s qualification as an OOD.

Regarding the applicant’s allegations that the “poisoned” perception of him created by the XO had lingered during the second reporting period, the CO stated that the XO2,

after having relieved [the XO] as Executive Officer, was very open-minded about everyone on board—i.e., she would form her own opinions based on her own observations and experiences. With regard to the Applicant, I recall that she was aware he had had a slow start and was committed to work with him to help him succeed. . . . [However,] her initial positive impressions gave way to increasingly frequent instances of frustration which she brought to my attention. The problem areas . . . seemed to center around lack of initiative and responsiveness, and weak interpersonal skills. [The XO2] eventually engaged . . . an experienced senior enlisted man, to work informally with the Applicant, particularly to assist him in developing an effective leadership style. This initiative produced positive results

Affidavit of the XO, the First Executive Officer of the Xxxx

The XO strenuously denied the allegations that the Xxxx had a racist atmosphere and that he had created or contributed to it. The XO stated that he speaks fluent xxxxxx and has “a particular interest, appreciation and respect for the xxxxxx people and culture.” Moreover, he stated that the applicant knew this and “was appreciative of [the XO’s] sensitivity and support for human relations.” Furthermore, “[a]board XXXX we held regular Human Relations Board meetings (minimum of quarterly). I don’t remember ever noting any discussion of a racist/biased environment.” In addition, during the XO’s tour, he “arranged a xxxxxxxx . . . survey. . . . [T]he initial results were received in the summer/fall of 199x and a positive work environment was supported by the survey.”

Regarding the applicant’s performance, the XO stated that “[i]n late January 199x, concern over [the applicant’s] weak performance and lack of response to counseling prompted us to prepare a strawman OER (not to be submitted) so that he could clearly see where he stood at present . . . and counseled him on his performance to date—discussing with him how he had earned the comments and evaluations noted.” The XO characterized the applicant’s main failing at the time as being “haughty and

presumptuous with peers and subordinates. His interaction with enlisted watchstanders and other crewmembers was directive and dismissive. I remember the Operations Officer, Commanding Officer and myself remarking on this numerous times in light of [the applicant's] enlisted experience. . . . [I]t is [now] clear to me that [the applicant] never had to supervise any subordinates until reporting to XXXX. . . ."

Regarding the delay in the applicant's qualification for OOD, the XO stated that the applicant "was having trouble qualifying as an underway OOD To provide [the applicant] with additional underway time to develop the necessary skills we arranged for him to go aboard CGC xxxx for approximately xxx weeks." Moreover, the XO pointed out, because he departed the *Xxxx* soon after completing the first disputed OER, the applicant had no reason to fear that the XO could retaliate if the applicant had protested the OER.

Affidavit of the OO, the Operations Officer of the Xxxx

The OO stated that the marks he gave the applicant in the first disputed OER were based on the applicant's performance. He based his evaluation of the applicant on his own observations and on input from the CO, XO, and several OODs with whom the applicant had trained. The OO denied that the XO ever directed him to lower particular marks. He stated that the XO and CO would review OERs as a "reality check" and to prevent "inflation." "Occasionally, the review would result in a general shift to the left or right of an individual's marks." The XO told him that the procedure was the CO's policy, and the OO stated that "it was generally consistent with guidance in the Personnel Manual and with procedures [he] has seen at other commands."

The OO stated that he had "acknowledged [the applicant's] own observation that his limited sea time put him at a disadvantage to those who had acquired a lot more sea time on cadet cruises." However, the OO stated, he "never told him he would never be at the same level as the Academy graduates, and . . . never related his performance or performance potential to his [redacted ethnicity] background or source of commission."

Regarding the XO's "harsh" behavior, the OO stated that the XO "treated everyone that way." He denied that the applicant had been targeted. The OO also stated that the XO's emphasis on preserving the integrity of the evaluation system rather than on the promotion competitiveness of the evaluatees, and his "harsh 'win/lose' leadership style that he expected the officers and chiefs to emulate, created a great amount of distrust and speculation, and put most everyone in an unhealthy 'survival' mode." The OO further stated that "I am not surprised that an appeal such as this has arisen from that environment. I am surprised, however, to see accusations of racism and discrimination. We had a very diverse crew, and I was always impressed that I never saw or heard even a hint of racism or discrimination from anyone."

Affidavit of the XO2, the Second Executive Officer of the Xxxx

The XO2 stated that, when she arrived on board the Xxxx, the morale of the crew was "commensurate with a crew that was well taken care of, challenged by the missions they faced, but well prepared to do so." She does "not believe that [the applicant] suffered under the 'poisoned environment' he claims existed."

Regarding the second disputed OER, the XO2 stated that she "stand[s] by it in its entirety." She stated that the applicant received a mark of 3 in block 4.c. because at the time, he "did not meet the parameters of the OER definition of a '4'." She stated that the comments the applicant complained of were quite consistent because the applicant "**did** do well with his peers and seniors However, this was **not** the case with his subordinates. He was frequently overbearing, and took a long time learning the value of a simple 'thank-you' or 'please.'" She stated that the crew had left notes in the sug-

gestion box with comments such as "Improve morale, throw [the applicant] overboard."

The XO2 stated that, after she ordered someone to mentor him, the applicant improved greatly and "the crew's rapport with him changed accordingly." By the end of his tour on board, she "would have been happy to retain him in the wardroom of XXXX." He is now "a good role model and a good officer."

APPLICANT'S RESPONSE

On October 16, 1998, the Chairman forwarded the Chief Counsel's advisory opinion to the applicant and invited him to respond. On October 29, 1998, the applicant responded, reiterating his allegations and submitting a copy of the last OER he received while on active duty in the Coast Guard.

RELEVANT REGULATIONS

Article 10-A of the Personnel Manual (COMDTINST M1000.6A) governs the preparation of OERs. Each OER is prepared by the reported-on officer's "rating chain" of three senior officers: the supervisor (the officer to whom the reported-on officer answers on a daily basis), the reporting officer (the supervisor's supervisor), and the reviewer (the reporting officer's supervisor). Section 10-A-1 states the following:

b. Each commanding officer must ensure that accurate, fair, and objective evaluations are provided to all officers under their command. All supervisory personnel will see to it that evaluations of their subordinates are completed on schedule and in accordance with the prescribed standards. . . . [S]trict and conscientious adherence to the specific wording of the standards is essential to realizing the purpose of the evaluation system.

According to Section 10-A-2.e.(2) of the Personnel Manual, which governs the responsibilities of the reporting officer, the reporting officer

(d) [e]nsures the Supervisor fully meets responsibilities for administration of [the Officer Evaluation System]. Reporting Officers are expected to hold those persons designated as Supervisors accountable for timely and accurate evaluations. If a Supervisor submits evaluations that are inconsistent with actual performance or unsubstantiated by narrative comments, the Reporting Officer shall return the report for correction or reconsideration, counsel the Supervisor, and consider this when reporting on the performance of the Supervisor. The Reporting Officer may not direct in what manner an evaluation mark or comment is to be changed

.....

According to Section 10-A-2.f.(2) of the Personnel Manual, which lists the responsibilities of the reviewer, the reviewer

(a) [e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.

(b) [c]hecks for obvious errors, omissions, or inconsistencies between numerical evaluations and written comments and any failures to comply with instructions. . . .

• • •

(d) [e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the [Officer Evaluation System]. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. the Reviewer may not, however, direct in what manner an evaluation mark or comment is to be changed. . . .

Section 10-A-4.d. of the Personnel Manual governs the preparation of OERs. The instructions state the following:

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

(e) Comments should amplify and be consistent with the numerical evaluations in the evaluation area. They should identify specific strengths and weaknesses in performance or qualities. Well-written comments must be sufficiently specific to paint a picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. . . .

SUMMARY OF THE APPLICANT'S RECORD

The applicant enlisted in the Coast Guard as a xxx on xxxxx, 19xx. In 19xx, he enrolled in Officer Candidate School, and he received his commission on July xx, 19xx. Thereafter, he served as a xxx officer, xxxxxxxxxxxxxxxx regulations at Coast Guard xxx. In June 199x, he became a xxxxxxxxxxxxxxxx. In the fall of 199x, the applicant began serving temporary active duty on the Xxxx and standing break-in watches. He then requested and received sea duty. The OERs he received for his performance from the date of his commission until the date he reported to the Xxxx are numbers 1, 2, and 3, in the chart on page 11, below.

First Disputed OER

The applicant was promoted to xxxxxx and reported to the Xxxx on October 28, 199x. For his first nine months on board, he served as a deck watch officer, xxxxxx xxxxxxxxxxxxxxxxxxxxxxxx, civil rights officer, xx, before assuming duties as xxxxxx. The first disputed OER, which covers this period, is number 4 in the chart on page 11, below.

The OO, as the supervisor for the first disputed OER, prepared blocks 3 through 7. Under block 3, "Performance of Duties," the applicant received marks of 3 in blocks 3.a., "Being Prepared," 3.b., "Using Resources," and 3.f., "Operational/Specialty Expertise." The comments for that section include the following:

Conscientious about planning & organizing individual work items . . . still developing ability to manage multiple projects As morale officer, learning to pull diverse group together. . . . Focuses well on clearly defined projects & can produce very good product when understands situation Very responsive to seniors; quick initial action to assignments but loses steam w/ tasked by new incoming priorities. . . . worked w/ E2 on personal counseling; worked w/ PO2 on child's health concerns Professional development continues; qual[ified] as OOD inport . . . xxxxxx language definite asset [Underway] qual[ifications] not on par w/ time aboard

Under block 4, "Interpersonal Relations," the applicant received a mark of 3 in block 4.a., "Working with Others." These comments follow that section:

Interacts/works well w/ seniors . . . willingly shared enlisted experience Substantial interaction w/ crew on morale, civil rights & housing issues; becoming more adept at combining tact with direction when dealing with the crew; inflexibility alienates others further detracting from team effort. . . .

Under block 5, "Leadership Skills," the applicant received a mark of 3 in block 5.c., "Directing Others." The comments for that section include the following:

Excellent preparation and presentation of training materials As OOD, provides timely performance feedback to subordinates Leadership effectiveness hampered by dictatorial approach; doesn't appreciate expertise of experienced personnel; recognized problem and taking steps toward improvement. . . .

As the reporting officer, the XO prepared blocks 8 through 11. His comments in block 8 include the following:

[Sea duty] has presented a steep learning curve on many fronts . . . personal qualification standards, teamwork & leadership. He has been counseled regularly on his performance and shortcomings w/ clear recommendations for improvement. He continues to indicate a desire to succeed, but has yet to make

the commitment in time, effort & attitude required of a [junior officer] to succeed afloat.

Under block 9, "Personal Qualities," the applicant received a mark of 3 in block 9.c., "Responsibility." The comments for that section include the following:

. . . Learning full extent of resp[onsibilities] of morale officer and training officer positions. Responsibility would benefit from proactively following issues vice waiting for others to submit their input to him. . . .

The XO's comments in block 11, "Leadership and Potential," include the following:

[The applicant] . . . has not yet proven an asset to the XXXX leadership team. His learning curve has been steep and he is working diligently towards conquering it, but is not yet ready for continued assignments of greater responsibility. With the continued performance and professional development expected during the remainder of his tour aboard the XXXX I would expect him to be qualified and ready for promotion to xxx with his peers.

Second Disputed OER

From July 28, 199x, to January 31, 199x, the applicant served as deck watch officer, in-port and underway OOD, xxxxxxxxxxxxxxxx and civil rights officer. The second disputed OER, which covers this period, is number 5 in the chart on page 11, below.

The XO2, as the supervisor for this OER, gave the applicant a mark of 3 in block 4.a., "Working with Others." The comments that follow block 4 include the following:

Works well with peers & seniors . . . has difficulties relating to subord[inates], surprising since he was prior enlisted himself; tends to be overbearing & prone to work solely from position, rather than personal, power base.

The CO, the reporting officer for this OER, gave the applicant a mark of 3 in block 9.a., "Initiative." The comments for block 9 include the following:

Responded well to explicit tasking from CO/XO, but needs improvement in initiating new action on his own & in following thru w/ minimal direction—particularly evident in collat[eral] duties . . . Showed good judgment as [underway] OOD, consistently making correct recommendations on shipping situations; made good decisions under stress while controlling Cuban migrants . . .

In block 11, "Leadership and Potential," the CO included the following comments:

[The applicant] has made great progress in becoming a qualified DWO & boarding officer However, most of the reporting period was characterized by continuing need for improvement in leadership—i.e. team-building, and motivation & caring supervision of subordinates to achieve goals. Notable improvement was seen late in the period as he responded positively to [senior] enlisted feedback . . . if this trend continues he will be suited for jobs involving greater leadership responsibilities Similarly, a solid tour marked by performance like that seen recently will make him well-qual[ified] for promotion to [xxxxx].

Subsequent Service Records

The applicant served aboard the *Xxxx* until June 2, 199x, performing substantially the same duties. The OER for this period is number 6 in the chart below. The XO2 was the supervisor for the OER, and the CO was the reporting officer. The applicant's next assignment was as chief of xxxxxx for the xxx Coast Guard District. His OERs for this tour from June 3, 199x, to July 31, 199x, are numbers 7 and 8 in the chart below. The applicant failed of selection for xxxxx for the first time in the fall of 199x.

From August 1, 199x, to May 31, 199x, the applicant served as chief of xxxxxx for the xxxx Coast Guard District. His OERs for this period are numbers 9, 10, and 11 in the chart below. Having been passed over for promotion on active duty a second time, he requested and was awarded a commission in the Coast Guard Reserve.

APPLICANT'S MARKS IN 11 OERs FROM 7/17/xx THROUGH 5/31/xx

CATEGORY^a	1	2	3	4^b	5^b	6	7	8	9	10	11	AVE^c
Being Prepared/Planning												
Using Resources												
Getting Results												
Responsiveness												
Work-Life Sensitivity ^d												
Adaptability ^d												
Specialty Expertise/ Professional Competence												
Collateral Duty ^d												
Working with Others/ Teamwork												
Human Relations/ Workplace Climate												
Looking Out for Others												
Developing Subordinates												
Directing Others												
Evaluations												
Speaking & Listening												
Writing												
Initiative												
Judgment												
Responsibility												
Stamina ^d												
Health & Well-Being												
Military Bearing ^d												
Professionalism												
Dealing with the Public ^d												
Comparison Scale ^e												
Average for OER												

^a Some categories' names have changed slightly over the years.

^b Disputed OER.

^c Average score of all OERs except disputed ones, which are shaded. Averages have been rounded.

^d Category nonexistent until later years, or category discontinued.

^e The Comparison Scale is not actually numbered. Officers are compared against others of the same rank. In this row, a 6 means the applicant was rated to be "an exceptional officer"; a 5, 4, or 3 means the applicant was rated to be a "one of the many competent professionals who form the majority of this grade."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. Under Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 199x), the application was timely.

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that two of the three OERs he received for his service aboard the cutter *Xxxx* were the result of a racist environment on board and discrimination by members of his rating chain. He cited his [redacted nationality] heritage and lack of commission from the Coast Guard Academy as the causes of that discrimination. The applicant also alleged that one of the reporting officers had ordered his supervisor to lower certain marks and had prevented his qualifying as an officer of the deck. In addition, the applicant alleged that the two disputed OERs contained inconsistencies and that the selection board unfairly focused on those OERs when it failed to select him for promotion.

4. The Chief Counsel of the Coast Guard argued that the Board should dismiss the case for failure to exhaust administrative remedies because the applicant did not file a civil rights complaint. Although the report and finding of an investigation by the Departmental Office of Civil Rights would have increased the amount of evidence available to the Board, they would not constitute a "remedy" because they could not remove the alleged errors and injustices from the applicant's record. Therefore, the Board finds that the applicant's failure to file a civil rights complaint does not constitute a failure to exhaust administrative remedies.

5. The applicant stated that many incidents of the alleged discrimination were witnessed by other officers and enlisted members. He also alleged that the reporting officer for the first disputed OER had directed the supervisor to lower his marks and add negative comments. However, he failed to submit any affidavits to support his allegations. The Chief Counsel submitted four affidavits from officers on the *Xxxx* who thoroughly refuted each of the applicant's allegations. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the disputed OERs were the result of discrimination by any of the officers on board the *Xxxx*. Nor has he proved that the reporting officer of the first disputed OER directed the supervisor to lower marks or add negative comments in violation of Section 10-A-2.e.(2) of the Personnel Manual.

6. The applicant alleged that the low marks he received in the disputed OERs were inconsistent with corresponding positive comments. Section 10-A-4.d. of the Personnel Manual requires that comments be consistent with the assigned marks and that any deviation from a mark of 4 be supported in the comments. In addition, the inclusion of both positive and negative comments in an OER is encouraged in Section 10-A-4.d of the Personnel Manual. The Board finds that each mark of 3 in the two disputed OERs is supported in the comments. The inclusion of some positive as well as some negative comments in the OERs does not create an invalidating inconsistency.

7. The two disputed OERs are clearly the poorest in the applicant's record, and they may well have persuaded the selection board not to promote him. However, the applicant has not proved that the OERs are in error or unjust. The Board will not second-guess a properly constituted selection board's decision which is based on an accurate record.

8. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed an error or injustice by including the two disputed OERs in his record or by failing to select him for promotion to xxxxxxxx.

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

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of XXXXXXXXX, USCG, is hereby denied.

George Kuehne, Jr.

Michael K. Nolan

Coleman R. Sachs