

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-076

XXXXXXXXXXXXXXXXXX,
XXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on March 11, 2005, upon receipt of the completed application.

This final decision, dated January 18, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to remove from his record an officer evaluation report (OER) covering his performance as the supervisor of XXXXXXX XXXXX (XXXX) XXXXXXX XXXXXX from June 1, 2001, to June 1, 2002. He also asked the Board to remove his failure of selection for promotion to commander in 2005 so that he would be considered for selection in 2006 as if he had not previously failed of selection. In addition, he asked that, if he is selected for promotion by the first commander selection board to review his record without the erroneous OER, the Board backdate his date of rank to what it would have been had he been selected for promotion in 2005 instead of 2006 and award him back pay and allowances.

The applicant stated that after assuming the position as the supervisor of XXXXXXX XXXXXX (hereinafter "XXXXX"), his duties included managing the district's third largest budget; managing and supervising a 95-acre facility with 66 family housing units, 3 buildings for unaccompanied personnel, a galley, and a medical clinic; and handling all the logistical requirements of the commands based at XXXXXX. In addition, he served as the XXXXXXXXXXXXXXXXXXXXXXX at a base xx miles from XXXXXX. As SOCO, he supervised 59 members at a Vessel Traffic Center and coordinated responses to all marine safety incidents in the region.

The applicant alleged that he was repeatedly praised for his performance during the evaluation period of the disputed OER—most notably for his response and assistance in the aftermath of the attack on the World Trade Center (WTC) on September 11, 2001 (hereinafter “9/11”). He alleged that his performance is reflected in the “glowing comments” in the disputed OER but not in the numerical marks he received. He alleged that the marks are “wildly inconsistent” with the comments, in violation of Article 10.A.4.c. of the Personnel Manual, and with other marks he has received in OERs throughout his career. In addition, the applicant alleged that during the evaluation period, he was never counseled about his performance by his Supervisor and was enthusiastically endorsed by the Commander, XXXX, for a high-profile position at the Office of Homeland Security.

The applicant alleged that after he received a copy of the disputed OER in September 2002, he met with his Supervisor to discuss the marks. He alleged that the Supervisor identified the following five reasons for the marks:

- (1) CWO X, the commanding officer (CO) of Station Xxxxxx, had told the Supervisor that the applicant had, without authority, searched a barracks room after a break-in and theft of liquor at the PX.
- (2) The Supervisor was dissatisfied with how the applicant had managed a situation in which a petty officer had threatened to kill a corpsman.
- (3) The applicant had “picked on” BMC X, the executive petty officer (XPO) of Station Xxxxxx, by ordering him to obtain valid Coast Guard decals for his vehicle.
- (4) The Supervisor had received an e-mail from the spouse of a resident member who claimed that the applicant had made her family’s life “unlivable.”
- (5) CWO X had told the Supervisor that the applicant was “never” at work.

The applicant alleged that each of these statements is false and unfair. With respect to (1), the applicant stated that it was CWO X who searched the barracks room and that CWO X admitted to the Supervisor that he had searched the barracks. The applicant alleged that he was not in the barracks during the search and “did not know anything about it until [the Supervisor’s] inquiry.” He alleged that CWO X thought that he had authority to conduct the search because he was the CO of Station Xxxxxx. The applicant stated that there was no written guidance on the subject because Xxxxxx had only recently been joined with four other Xxxxxx commands into a single command. Given CWO X’s admission that he searched the barracks, the applicant argued, the Supervisor’s understanding was erroneous, and the applicant was evaluated in the disputed OER based on misinformation.

With respect to (2), the applicant alleged that he was on leave at the time of the incident and was only informed after the fact that a petty officer had threatened a corpsman “with a bullet with his name on it” and been sent, by order of the Deputy Commander of XXXX, to Walter Reed Army Hospital for a psychiatric evaluation. He

alleged that he was not present at Xxxxxx to manage the situation and only learned afterward by telephone how it had been resolved.

With respect to (3), the applicant alleged that he was not “picking on” or singling out BMC X by requiring him to obtain a valid car decal to enter Xxxxxx. He alleged that all other personnel had obtained the decals, which were available on base, and that BMC X “was being disrespectful and ‘difficult’ by refusing to obtain the proper decals in accordance with regulation despite repeated requests from Security and, ultimately, orders from [the applicant].” He alleged that several of the guards had complained that BMC X was “giving them a hard time when they asked for him to identify himself because his vehicle did not have a valid CG sticker.” Other chief petty officers told BMC X to get a sticker but finally asked the applicant to intervene. BMC X argued with him about whether a decal was required but acquiesced when he was shown the rule book and “apologized to [the applicant] for his insubordinate behavior.”

With respect to (4), the applicant stated that the e-mail concerned a family whose child allegedly sexually abused a child of the family next door. The applicant alleged that he moved the family to a different house within Xxxxxx, which was difficult because no one wanted to live near this family. He also called upon Work-Life counselors to help the family on several occasions, but the family refused to accept counseling for six months. He alleged that “[w]hen it became clear that the family could not reside peaceably with the other residents at Xxxxxx, [the counselor] recommended moving them off base.” The applicant stated that he did not have that authority and so the decision to move the family was made by the Commander of XXXX. The applicant stated that he cannot submit documentation of these facts because they are protected under the Privacy Act but noted that the Board could get them.

With respect to (5), the applicant stated that he lived on base at Xxxxxx, about 100 feet from his office, and so was constantly present. He alleged that he worked in his office regularly and often worked late. Because of his duties as SOCO, which the Supervisor approved, he did have to stand watch duty xx miles away in Xxxxxx sometimes. The applicant alleged that he was always present whenever the Supervisor visited Xxxxxx. Moreover, he stated, CWO X has denied ever making such a statement to the Supervisor.

The applicant alleged that the marks of 4¹ he received in the performance categories “Results/Effectiveness,” “Adaptability,” “Looking Out for Others,” “Workplace Climate,” “Directing Others,” “Evaluations,” and “Judgment,” are particularly inconsistent with the supporting comments since a mark of 4 constitutes “the expected standard of performance,” while the comments show superior performance that is clearly far above the expected standard in those categories. He alleged that the written comments “portray an officer who was extremely effective and showed his superior adapt-

¹ Officers are evaluated in a variety of performance categories on a scale of 1 to 7, with 7 being best.

ability in the aftermath of the 9/11 attacks” and reflect his “superlative effort ... in ‘looking out’ for his subordinates and fostering an excellent command climate.”

The applicant alleged that the mark of 4 he received on the Comparison Scale in the disputed OER caused the most egregious harm to his career as the “death knell of an officer’s career comes with lackluster marks.” He pointed out that on other OERs he has consistently received marks of 5 on the Comparison Scale.

The applicant alleged that the Reviewer of the disputed OER has admitted that, some time after signing the OER, he realized that the applicant had done a “great job” because Xxxxxx “went straight down hill after [the applicant] left.” However, because he was new to the position of Commander of XXXX when he signed the OER, he relied on the assessments of the Supervisor and Reporting Officer.

The applicant argued that the entire OER should be removed from his record because it is “pervasively tainted by [the Supervisor’s] bizarre explanations as well as the use of marks that do not reasonably relate to the favorable narrative comments.” He argued that because the damage to the OER is pervasive, “it is impossible or impracticable to isolate and redact specific incorrect or unjust material.”

Statements Submitted by the Applicant

(A) The Superintendent of the national park at Xxxxxx stated that he worked closely with the applicant following 9/11 to integrate the park’s rangers and rescue workers into the Coast Guard’s response. He stated that the applicant facilitated the training and equipment of park personnel and arranged for the Coast Guard to use the park’s 41-foot utility boat and 50-bed dormitory in the weeks after 9/11.

(B) The President of the xxxxxxxxxxxxxx of the Navy League stated that of all the supervisors at Xxxxxx over the past two decades, the applicant had done the most to improve conditions at the base and in the community. He stated that the applicant had improved security and recreational facilities and ensured that the local private day care facility got painted and maintained so that it would pass inspection. He stated that “there could have been no better person to lead the Coast Guard base at Xxxxxx than [the applicant] during those tense times.”

(C) The applicant submitted an e-mail from the prior Commander of XXXX, dated December 20, 2001, which shows that RADM X strongly recommended the applicant for the position of Military Aide to Director, Office of Homeland Security.

(D) The applicant submitted a series of e-mails in which CWO X stated that in July 2001, the PX at Xxxxxx was burgled and that liquor, cigarettes, and candy were stolen. He suspected a particular non-rate who “had an extensive history of misconduct involving alcohol.” As the commanding officer of Station Xxxxxx, CWO X got

permission from his supervisor, LCDR O, to search the non-rate's barracks room. CWO X and the station's operations petty officer conducted the search but the contraband was not found and Coast Guard investigators later determined that other parties committed the burglary. CWO X also stated that he never told the applicant's Supervisor that the applicant searched the barracks and that he had never denied searching the barracks himself. CWO X further stated that he cannot remember ever discussing the applicant's attendance at Xxxxxx with the Supervisor.

(E) The applicant submitted an e-mail in which YNC X, the Supervisor of Housing and Administration at Xxxxxx, stated that the applicant was out of town on leave when a petty officer threatened someone. The situation was resolved within 20 minutes when the Deputy Commander ordered that the petty officer be escorted to a hospital for a psychiatric evaluation. He stated that during the situation, he left some voicemail messages for the applicant, who returned the calls when he got the messages.

(F) A senior chief petty officer who was temporarily assigned to Xxxxxx in late 2001 stated that BMC X "repeatedly failed to comply with a directive by [the applicant] to obtain the appropriate CG vehicle registration for his pickup truck. I personally spoke with [BMC X] and asked that he obtain the proper CG decals. I believe at least one of the other security personnel had spoken with [BMC X] and made the same request. [BMC X] chose to make an issue of this ... [The applicant] was simply attempting to enforce standard Coast Guard policy in making this directive to [BMC X]. ... During my four months at Xxxxxx, I always found [the applicant] to be a reasonable and rational individual who attempted to enforce regulations for the well being of all personnel and with minimum of inconvenience."

(G) The applicant submitted a copy of a letter dated November 19, 2001, from the Commander of XXXX to a petty officer, Mr. Q, at Xxxxxx. The letter states that Mr. Q's 7-year-old son had "exhibited inappropriate sexual behavior toward another child in Coast Guard family housing at Xxxxxx" in March 2001. The letter states that Mr. Q had failed in his duty to comply with a State order to have the child undergo professional counseling and that similar conduct by the son would result in the revocation of Mr. Q's privilege to occupy government housing.

(H) ET1 M stated that from July 2001 to July 2002, he lived in a building at Xxxxxx that also held the applicant's office. He stated that the applicant worked until 6:00 or 7:00 four or five evenings each week and sometimes on weekends. He stated that this memory is vivid because he would stick his head in the applicant's office and "make comments about why he was still there."

The applicant also submitted three statements by senior officers who had supervised his work in previous positions at XXXX. These officers highly praised the applicant's performance. In addition, the applicant submitted his own input for the OER, which he had provided to the Supervisor and which consisted of eleven pages of his

assessment of his own accomplishments with respect to each performance category on an OER form.

SUMMARY OF THE RECORD

A former officer in the U.S. Marine Corps, the applicant received his commission in the Coast Guard on September 28, 1990. As an ensign and lieutenant junior grade, he served for three months as an instructor at Officer Candidate School, for three years and five months as the Officer-in-Charge of the Coast Guard's 75-member Honor Guard, and for twenty months as a deck watch officer on a high endurance cutter.

In 1995, the applicant was promoted to lieutenant and assigned to Group Xxxxxx as the Assistant Port Prevention Branch Chief. On his OER for this service, he received primarily marks of 5 in the various performance categories and a mark of 4 on the Comparison Scale.² Following the organization of XXXX, the applicant became the XXXX Precom Section Leader, coordinating the computer and phone networks, and an Activities Duty Officer (ADO), supervising a 17-member watch section and directing responses to marine safety incidents. On his first OER for this service, the applicant received primarily marks of 5 in the performance categories and a 4 on the Comparison Scale. The applicant's next OER covered his final service as the Precom Section Leader and two months as a Marine Inspector, as well as service as an ADO. On this OER, he received primarily marks of 5 and 6 in the performance categories and a 5 on the Comparison Scale.

From December 1996 through May 1997, the applicant served as the coordinator for XXXX Fleet Week. On his OER for this service, the applicant received primarily marks of 5 and 6 in the performance categories and a 5 on the Comparison Scale. From June 1997 through May 1999, the applicant supervised several marine inspectors as supervisor of Port State Control barge section. He continued his collateral duty as ADO. On his first OER for this service, the applicant received primarily marks of 5 and 6 in the performance categories and a 5 on the Comparison Scale. On his second OER for this service, the applicant received primarily marks of 6 in the performance categories and a 5 on the Comparison Scale. From June 1999 through May 2001, the applicant served as the Port State Control Supervisor and as a senior and then lead ADO at XXXX. On his OER for this service, he received primarily marks of 6 in the performance categories and a 5 on the Comparison Scale.

² The Comparison Scale is not actually numbered. However, as with the performance categories, there are seven possible marks. A mark in the middle, or fourth, position means that the officer, in comparison with all other officers of the same rank whom the Reporting Officer has known throughout his career, is an "exceptional performer; very competent, highly respected professional." A mark in the fifth position means that the officer is a "distinguished performer; give tough, challenging, visible leadership assignments." A mark in the sixth position means that the officer is "strongly recommended for accelerated promotion." A mark in the seventh and highest position means that the officer is the "best officer of this grade" known to the Reporting Officer throughout the Reporting Officer's career.

From June 2001 through May 2002, the applicant served as the supervisor of Xxxxxxxx Xxxxxx. He supervised fourteen petty officers and handled the logistical requirements of the various commands that occupied the base. The OER indicates that he also served as a senior ADO. (A statement by the officer who oversaw the ADO rotation indicates that the applicant served on the rotation as ADO until July 2001.) On July 1, 2001, the applicant was promoted to lieutenant commander. The marks and comments on the (disputed) OER for this period appear in the chart below.

MARKS AND COMMENTS IN DISPUTED OER

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	5	Displayed keen planning ability by meticulously managing the 3 rd largest budget in D1. Ensured every logistical detail was calculated & executed. Prioritized a heavy workload with scarce personnel resources and had many successes. Worked tirelessly w/ XXXX, MLCLANT & numerous civilian contractors to carry out the myriad of activities associated w/ managing a detailed 500K budget process for 5 units. Flexible Officer, adjusted to changes and new directions with minor supervision. Assisted the Xxxxxxx as it transitioned to OPS tempo during WTC tragedy. ROO quickly identified emergency funding requirements, utilized an idea to use single cost code accounting which enabled excellent record keeping and resulted in proper reimbursement of money since unit funds were exhausted. Worked long hours alongside the rest of the staff in the aftermath of WTC attack – handled berthing, subsistence & logistical requirements for an additional 85 boat crew/security personnel. Through ROO's guidance the galley went to 24/7 operations overnight and tripled its output of daily meals served. ROO has a thorough grasp of operational & marine safety principles. As ADO, ROO immediately responded to all emergencies: Coor'd multiple state/federal assets under intense pressure. Skillfully handled a myriad of groundings, collisions, fires, oil spills w/ high media interest – decisive actions prevented loss of life & property.
3b	Using Resources	5	
3c	Results/ Effectiveness	4	
3d	Adaptability	4	
3e	Professional Competence	5	
4a	Speaking and Listening	6	Sensitive listener; discerns relevant info when counseling PO's. ROO is a composed and engaging speaker. Gave inspiring memorial speech to surviving members of WWII. Featured on local news during the first WTC memorial service in NJ. Dignified manner presented positive CG image. As ADO displayed clear ability to convey command views to maritime industry via written/verbal comms. & gave succinct briefs to senior CG staff. Superb writing ability: created SH mission statement, drafted detailed housing manual for xxxxxxxx and local SOP.
4b	Writing	5	
5a	Looking Out for Others	4	Strong Work-Life supporter: established flexible work hours for PO's to attend to sick family mbrs & go to school. Ensured mbr received emergency medical care during life threatening pregnancy condition. Followed up to ensure insurance info was correct. Organized trng w/ Health Benefits Advisor, career counselor & Critical Incident Stress Mgmt for CG mbrs & dependents – efforts created positive climate. Coached watchstanders in OPCEN while executing SAR/LE & pollution cases. Encouraged CG Aux mbr's participation in cmd projects; efforts reduced qualification time. Leadership skills were brought to bear during WTC OPS. ROO was instrumental in executing log coord effort: worked around the clock, anticipated & ordered \$1000's worth safety/security equip & vsl parts needed to support the 24/7 response efforts stemming from WTC. Distr buted \$43K of emergency and medical supplies to boat crews & security pers while conducting a flawless end of year fiscal close-out. Promoted team concept: split up watchstanding duties between units during heightened Threatcon. Established partnerships w/ local cmds, NPS DOD & state police to meet logistical & security needs. ROO values the opinions of others and articulates the importance of everyone's contribution. Evals are on time and complete with wealth of detailed info.
5b	Developing Others	5	
5c	Directing Others	4	
5d	Teamwork	5	
5e	Workplace Climate	4	
5f	Evaluations	4	
6	Signature of the Chief of XXXX Administrative Division, as Supervisor, dated June 11, 2002		
7	Reporting Officer's Comments	NA	Concur with Supervisor. The position at Xxxxxxx Xxxxxx has been a most challenging assignment for [the applicant] and [he] has worked hard at creating a positive community spirit. ROO organized several "town hall" meetings for residents to share ideas, air grievances and formulate action plans. ROO worked hard at forging positive relationships with local federal & state authorities; National Park Service, Department of Corrections. Made strides to increase the unit's representation in the local community.
8a	Initiative	5	Took on many new initiatives despite heavy workload. Started Clean Community prgm w/ local Mayors. Utilized NJ DOC for beach cleanups saving CG personnel for trng opportunities.

8b	Judgment	4	Established Admin services w/ reserve PO to assist 5 cmds w/ PCS, TAD orders & pay related problems – positive impact on 100+ personnel. Purchased new furniture & equipment for residents: significantly improved the habitability of the UPH, galley, offices, fitness Ctr, & community grounds & helped increase community spirit. During Operation Guardian Liberty made many decisions as Supvr: provided continuous services in Admin, Supply and Logistics, housing/berthing, transportation, Security, Vessel engineering and weapons training support to numerous CG units/personnel located at SH in response to WTC OPS. Excel judgment as ADO; e.g. quickly launched 41' to rescue 4 POB in P/C taking on water. Magnificent role model for others: organized partnerships in community. Volunteered for school projects & clean-ups. Painted local daycare Ctr to pass state inspection. Efforts highly praised by parents. Strongly committed to fitness: started weekly PT/sports prgm. Mentored female PO in fitness & nutrition (mbr lost 20 lbs & 6% body fat).
8c	Responsibility	5	
8d	Professional Presence	6	
8e	Health & Well-Being	5	
9	Comparison Scale	4	NA
10	Potential	NA	[The applicant] is a dedicated officer who was thrust into the role of Xxxxxxx Supervisor, had some difficulties in the transition to administrative work, but still had many accomplishments. However, his true skills lie in the marine inspection and operational duty officer arena and I recently had him re-assigned within my command to capitalize on these positive attributes. ROO is a superior leader when working in area of expertise. He is a strong candidate for positions of further responsibility in the "M" or "O" community and would make an ideal candidate for post graduate school. Recommended for promotion with his peers.
11	Signature of the Deputy Commander of XXXX, as Reporting Officer, dated June 9, 2002		
12	Signature of the Commander of XXXX, as Reviewer, dated June 12, 2002		

From June 2002 through August 2003, the applicant served as the Senior Command Duty Officer Coordinator and Maritime Homeland Security Section Leader. On his OER for this service, the applicant received all marks of 6 (except one of 7) in the performance categories and a 5 on the Comparison Scale. From September 2003 through April 2005, he served as a Port Security Assessment Branch Chief and Terrorist Operations Team Leader. On both OERs for this service, the applicant was assigned primarily marks of 6 in the performance categories and a 5 on the Comparison Scale.

Over the course of his career, the applicant has received dozens of medals, ribbons, and letters of appreciation, including a Transportation 9/11 Medal and two Achievement Medals.

VIEWS OF THE COAST GUARD

On July 22, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. He based his decision in part on signed statements by the Supervisor, Reporting Officer, and Reviewer who signed the OER and on a memorandum on the case submitted by the Commander of the Coast Guard Personnel Command (CGPC). These documents are summarized below.

Summarized Statement of the Supervisor

The Supervisor for the disputed OER, who was Chief of the Administration Division at XXXX from June 1999 through June 2003, alleged that the disputed OER "is an accurate, fair and unbiased evaluation of [the applicant's] performance of duties during

that time period.” The Supervisor stated that although the applicant was the highest ranking officer at Xxxxxx, he was the “landlord” and supposed to work cooperatively with the COs of the cutters that were homeported there, the CO of Station Xxxxxx (CWO X), and the Engineering Supervisor (CWO Z), who reported directly to other division chiefs at XXXX rather than to the applicant.

The Supervisor alleged that the applicant’s application is “filled with half-truths and false allegations.” He stated that the applicant “was determined to be unfit to serve as Supervisor of [Xxxxxx] by his superiors in the chain of command and they moved him out of this position.” He alleged that “[t]hrough a multitude of mishaps and blunders, [the applicant] demonstrated to [the Deputy Commander and Commander of XXXX] that he was unfit to lead the xxxxxxxx. After [RADM X, Commander, XXXX] retired, [the Deputy Commander] discussed the Xxxxxx issues with [the new Commander, RADM Y, who reviewed the disputed OER,] and convinced him that the only course of action was to remove [the applicant] from Xxxxxx.”

The Supervisor listed the following as examples of the applicant’s alleged blunders: (a) After a chief petty officer committed suicide, the applicant “was unable to handle the situation, to a point where one senior member of [the Xxxxxxxx] accused him of ‘shirking.’” (b) Without authority, the applicant set a playground curfew. (c) The applicant failed to respond with an appropriate level of urgency to 9/11. (d) The applicant had a poor working relationship with the engineering staff. (e) A family asked to be moved off the base because they felt harassed by the applicant and his family.” (f) The trouble with this family became “the talk of the base community and resulted in several senior members of Xxxxxx, and their spouses, arguing with one another.” (g) Members got the impression that the applicant took care of his own personal needs above those of others. (h) The applicant “cursed at and was verbally abusive to members in the community.” (i) Senior members reported that the applicant was rarely in the office and showed up in civilian attire. (j) The applicant had an “ongoing feud with the Executive Petty Officer (XPO) of Station Xxxxxx that resulted in [the applicant] attempting to place the XPO on report. (k) The applicant “developed a poor working relationship with his Yeoman Chief and requested that the individual be removed from the staff.” (l) The applicant created a problem by attempting to intervene in the K9 unit though he had no responsibility for it. (m) A member of the Work-Life staff reported that the applicant was “violating command confidentiality” because despite many reminders of the need for confidentiality, he shared personnel problems with his wife, who “then spread this information throughout the Xxxxxx community.” The Supervisor stated that these were the sorts of problems that resulted in the applicant’s removal from the Xxxxxx and in the disputed OER.

Regarding the applicant’s allegation about lack of counseling, the Supervisor stated that the applicant received both oral and written guidance (see below). He alleged that he met regularly with the applicant, who “was constantly receiving verbal

feedback from me” and was called into the Deputy Commander’s office for counseling sessions several times.

Moreover, the Supervisor stated that he does not remember focusing on only the five issues the applicant raised in his application when the applicant asked him about the OER. However, the Supervisor stated, he would address the five issues since the applicant focused on them in the application. Regarding the applicant’s allegation (1), the Supervisor stated that the applicant “is telling only half the story.” He alleged that the search issue arose three times and that, after the first, he counseled the applicant about the need for permission from a military judge or Commander, XXXX, to conduct a search. However, a few weeks later, the applicant told him that CWO X had entered a member’s room to look for stolen goods. When the Supervisor asked about CWO X’s authority for the search, the applicant “replied that [CWO X] was a CO and the authority was inherent in his position,” even though the Supervisor had recently “made it abundantly clear that no one other than [the Commander, XXXX] could authorize [such] a search.” The Supervisor stated that he felt that the applicant was “playing dumb” and “allowed the search of the room even though he had specific instructions from me to the contrary.” The Supervisor also stated that CWO X reported that when cocaine was discovered in a barracks, the applicant failed to respond to various summonses. The Supervisor concluded that the “central issue at hand was [the applicant’s] leadership ability” and that such issues affected the applicant’s numerical marks in the disputed OER. “At times when he should have been front and center and taking care of the unit’s business he would act slowly, inappropriately or, if one believes [CWO X], [the applicant] would hide in his house and refuse to face the issue.”

Regarding the applicant’s allegation (2), the Supervisor stated that he also was out of town when the threat occurred and so the matter was handled by the Deputy Commander. However, the Supervisor was disappointed with the applicant’s response to a related problem during the following days. He stated that “[t]wo members of [the applicant’s] staff began to undermine [the Deputy Commander’s] decision by sending emails throughout Xxxxxx offices and even to Walter Reed hospital!” When the Supervisor demanded that the applicant take immediate action against them, the applicant “dragged his feet” until the chief petty officers decided to hold a Chiefs Mast, “rather than entrust the leadership training and counseling to [the applicant].”

Regarding the applicant’s allegation (3), the Supervisor stated that he never said that the applicant was “picking on” BMC X, but another division chief told him that the applicant was doing so. The Supervisor stated that the applicant placed BMC X on report even though both he and the other division chief told the applicant that he was being petty over a known person in a known vehicle with an outdated sticker. The Supervisor stated that the applicant’s way of getting BMC X to comply with the rules was a leadership test that he failed and that his response created morale problems instead of defusing the issue.

Regarding the applicant's allegation (4), the Supervisor stated that the spouse in question was Mrs. Q, the mother of an 8-year-old boy who had sexually assaulted another child in March 2001. In March 2002, Mrs. Q e-mailed him "complaining that [the applicant's] family was tormenting her." The Supervisor had received an e-mail from the applicant the day before stating that Mrs. Q had been harassing a "10-year-old girl" in the neighborhood. However, Mrs. Q explained that it was the applicant's own daughter who had been "teasing and tormenting" her 8-year-old son for some time and that the applicant had done nothing to stop it. She stated that after she complained to the applicant, his daughter's behavior got worse. She alleged that the applicant himself had called the police and that they told her that if she did not keep her blinds down and her door shut, the applicant could get a protective order against her. The Supervisor stated that he quickly e-mailed the applicant with instructions, rather than telephoning him, "because he had a habit of not always hearing exactly what I was trying to say." He stated that there is no doubt in his mind that Mrs. Q and her family "felt threatened and harassed by the [applicant's] family. ... Other Coast Guard members felt the same way." The Supervisor further stated that on April 4, 2002, Mrs. Q reported that the applicant's daughter was staring into her home, which resulted in a confrontation between certain members and spouses. The applicant placed one member, CPO Z, on report. At the Supervisor's request, a Coast Guard attorney interviewed Mrs. Q and found that her emotional state and her lack of willingness to leave her house pointed to "a negative and hostile environment" at the base. In April 2002, the Deputy Commander "had enough of the whole matter and began investigating the possibilities of moving [the applicant]. ... The problems did not stop until the [applicant and his family] left the area. ... However, the [woman and her family] never had any further problems after [the applicant] moved back to Staten Island." The Supervisor stated that the applicant's responses to these problems affected his numerical marks for leadership skills.

Regarding the applicant's allegation (5), the Supervisor pointed to the following (see summaries below): a supporting a statement by the Deputy Commander; an e-mail from CWO X concerning the applicant's "work ethic"; an e-mail from CPO Y to CWO Z about the applicant's "very different work schedule"; and an e-mail from a lieutenant dated October 26, 2001, indicating that the applicant had skipped an important meeting with her and that CWO X and another member had told her that the applicant was "rarely there." The Supervisor stated that these reports made him "question" the applicant's performance of duty and contributed to the mark of 4 he assigned the applicant for the performance category "Results/Effectiveness."

The Supervisor provided explanations as to why he assigned the applicant marks of 4 in six performance categories. Regarding the lack of an award for his efforts following 9/11, the Supervisor stated that they were reserved for "personnel who worked 12 hours a day, for 21 days straight, and performed tasks above and beyond the call of duty." The Supervisor stated that he felt the applicant's performance had not met the criteria for a personal decoration. In support of his many allegations, the Supervisor submitted many e-mails and statements, including the following:

(A) An e-mail in which the Reporting Officer, who was the Deputy Commander of XXXX, advised the applicant in April 2005 that since he had been counseled about the authority necessary for a barracks search, after the theft at the PX, he should have told CWO X to wait until permission was obtained before searching the room. The Reporting Officer also stated that CWO X told him that "you never seemed to be there ... a tough point for me to understand when, as you said, you 'lived & worked there.'" He noted that it meant that the applicant "did not project enough command presence to make the Station CO feel any need to look harder for you." With regard to BMC X's outdated decal, the Reporting Officer stated that the applicant's "desire to drive home your point to [BMC X] looked petty and was way out of proportion to the seriousness of the matter." Regarding the threat incident, he stated that "I am the one who didn't like the way you handled the incidents that resulted from my having to send [the petty officer for a psychiatric evaluation]. [The applicant's staff members] were running an email battle that reached throughout the service. They even sent unsolicited advice directly to the tending physician. You had a very hard time supporting the Command, which sent the message to your troops that you agreed with them. Your hands-off approach forced [the Supervisor] and me to intervene"

Regarding the conflict with the other family on base, the Reporting Officer stated that the applicant "totally failed to contain the situation. Even though the family moved to another part of the housing area, the remaining tension eventually became a prime motivator for us to move you and your family back to Staten Island." The Reporting Officer stated that he had removed the applicant from Xxxxxx so as not to foist the problems onto the new Commander. He also stated that the applicant was "sent to the Xxxx with the hope that you would straighten out your family situation. You had been spending more and more time on duty and your wife was nearing another crisis during your absences. We thought that with your military bearing, your demonstrated excellent leadership in critical response situations, and your proclaimed desire to improve your family situation that the opening at the Xxxx would work well. But, your tendency to focus on the wrong things and your inability to keep your family situation from affecting the workplace led to your ultimate return to Staten Island. ... In a nutshell, you were sent to a reasonably harmonious working and living environment to keep the command from having to spend a lot of time on personnel problems. There's no way I can call your tour successful."

(B) In a Statement of Facts e-mailed by CWO X to CDR Y on April 11, 2002, CWO X stated that the applicant "openly admitted that he was not prepared to deal with" the suicide of a chief petty officer on July 31, 2001, and that the applicant's hesitation in taking a leadership role "got to the point where I brought it to [CDR Y's] attention and he spoke with [the applicant] about the matter. The death of a shipmate is not easy for anyone ... [b]ut it should never be used as an excuse to shirk the responsibilities of one's position."

CWO X further stated that after one petty officer seriously threatened another on August 6, 2001, the applicant, who was on leave, never contacted him for an update. At the end of the week, the Reporting Officer asked him for input about the applicant's leadership and "the mood of the community." CWO X told him that the applicant was "slow to take action when it was his duty to do so" and a "Chiefs' Mast was convened to deal with the two Petty Officers' inappropriate e-mails."

CWO X stated that on the afternoon of 9/11, the station was armed, secured, and inundated with personnel and resources. Just one reservist was checking in the new personnel. However, the applicant "goes home at 1600 as if it was any other day and shows up to work the next morning around 0800. His biggest concern during the remainder of the week was the Navy League annual lobster cookout. On Friday of the first week, it was to the point where the station could not effectively man the communication watch, organize boat crews, run search and rescue and conduct physical security. When [the applicant] reported to work Friday afternoon after taking his wife to the dentist, I confronted him with his duty to provide the physical security that the station could no longer provide the personnel."

CWO X further stated that on September 26, 2001, the applicant was concerned about a pool heater and neon sign. CWO X concluded that the applicant "did not have the big picture and involved himself with insignificant issues." On the same date, a guard found cocaine in a barracks passageway and contacted him. CWO X noted that both of the applicant's vehicles were in his driveway. However, when two petty officers went to the applicant's house and knocked on the door "for no less than fifteen minutes," no one answered the door. The members also tried the applicant's "recall [telephone] numbers with no success." CWO X stated that the applicant "appeared to be hiding in his home to avoid having to respond to the incident. Later that day he admitted to being home and [stated that he] didn't realize that there were attempts being made to contact him."

CWO X stated that in November 2001, he spoke to a visiting lieutenant (LT F) about the applicant's "work ethic. At the time he was rarely at work and when he did show up he would be in civilian attire. It was noticeable to the entire staff at the Xxxxxxxx. He led me to believe that he was spending a lot of time at XXXX. [LT F] informed me that was not the case. During this period, I had spoken to someone from the XXXX staff concerning [the applicant's] lack of effort, but I do not recall specifically who it was and do not want to speculate. ... It is my opinion that [the applicant] has difficulty identifying potential problems and stepping in to resolve them before they become escalated. The support role at Xxxxxxx has often been reversed and at times is an undue burden for the station."

(C) CWO Z, the Chief Engineer at Xxxxxxx, stated in an e-mail to the Supervisor dated April 11, 2002, that the applicant had ordered picnic tables with maintenance funds without consulting the Shore Maintenance Chief and then had expected the latter

to sign a procurement request after the fact. He stated that at the end of fiscal year 2001, the applicant ordered playground equipment and did not tell him until one week before its arrival. As a result, a shipment of crumbled rubber for the playground had to be delayed while the equipment was assembled, and the engineers work list was thrown off schedule. After this incident, he and his supervisor met with the applicant to discuss planning and CWO Z thought that the applicant had a clear understanding that such projects needed to be routed through his office. However, the applicant subsequently ordered a new propane pool heater even though CWO Z had already advised him that there was a "perfectly good solar heater pool cover" that needed only a \$200.00 manual hand roller. CWO Z complained that the purchase of the new propane heater had created a lot of work for his staff and would engender continuing maintenance and fuel costs. CWO Z stated that although the applicant had good intentions in these matters, he overlooked issues and did not plan properly. CWO Z stated that after 9/11, the applicant "seemed more focused on installing a lighted information sign for the base and organizing a lobster fest with the Navy League while each unit continued to provide round the clock support for the operation. He did manage to obtain barricades for the entrances to the base and organize a security force."

CWO Z stated that although he got along with the applicant personally, he had "heard so many third party stories ranging from threatening children to making remarks about someone's spouse. I have seen the police at his residency on numerous occasions." CWO Z stated that as the Xxxxxxxx supervisor, the applicant "should be the one restoring order" instead of being involved in housing squabbles himself.

(D) CPO Y stated in an e-mail dated April 10, 2002, that the applicant's manner of implementing his ideas "seems to be in question. Most believe he is doing them for himself with no thought of who or how things are going to be maintained." CPO Y stated that the applicant's projects, such as the new playground equipment, appeared to be for his own family's benefit "because nothing has been done anywhere else on board yet." CPO Y also stated that he had seen the applicant's family in his office on many occasions during the work day, which made it difficult to communicate with the applicant about certain issues, and that he had seen the applicant "in his office more often than not in civilian clothes." CPO Y stated that the applicant "has what appears to me to be a very different work schedule than most of us which isn't really any of my business but does make it difficult to conduct business on a daily basis if he is not there. It just seems to most of the senior personnel here at Xxxxxx that when something needs his attention he has been very difficult to track down, even by phone."

CPO Y stated that the applicant had had "verbal confrontations with other members' dependents, mainly children, concerning his children and the playground behind his home. Ranging from one incident where a child had squirted his child with a squirt gun and he supposedly threatened to cut that child's manhood off while he was holding an axe. He has also told one 11 year old that he was too old to play in the playground and ordered him to leave. ... There have been other complaints that he has accused

children of using foul language and of being too loud or just looking wrong at his family. I have to admit that these allegations are all second hand, but there have been too many to ignore." CPO Y stated that the applicant had told one member that her husband was "too 'weak of a man' to handle the children. ... [I]t appears that when [the applicant] finds a target he stays with it until it is destroyed."

(E) In an e-mail to the Supervisor dated October 26, 2001, LT F stated that she had gone to Xxxxxx the day before and that her "first priority" was to meet with the applicant, but he had taken his daughter to the dentist and was not there even though he had acknowledged her visit in advance by e-mail. LT F indicated that she felt that little work was being done in the applicant's office during his absence. CWO X told her that the applicant's office was not providing any administrative support "on the personnel side," although YN1 P had helped with his purchases and that YNC X had found berthing accommodations. CWO X also told her that the applicant's staff was working normal hours and "leaving at 1545, like usual." LT F concluded that "the Admin personnel at Xxxxxxxx meets the criteria of their unit title ... 'detached'. They are not providing the same services provided under [LCDR C's] era. From more than one source I was told that it doesn't really seem like anyone is in charge, except [YNC X] 'kind of' when [the applicant] is gone which seems to be a lot."

(F) A series of e-mails about a poor performance evaluation for a member of the applicant's staff due to her own e-mails following a petty officer's threat on another's life. The e-mails include comments about how long the evaluation was delayed after the incident and the Chiefs' Mast; why the applicant's office took a month to get it signed; why the Command Senior Chief at XXXX had been erroneously told it was "taken care of"; and how, once received by XXXX, it had to be returned due to incompleteness. The series includes one from the Supervisor, dated November 16, 2001, in which he stated that the delay was "unconscionable" and that "Xxxxxx needs to get it together immediately or bad things are going to happen." The series concludes with an e-mail dated November 17, 2001, from YNC X, who stated that he had not seen the evaluation since he first submitted it to the applicant on September 11, 2001.

(G) An e-mail dated November 27, 2001, to the Supervisor from the XXXX Health Clinic Administrator, who reported that a member of the applicant's staff had signed for a FedEx package of 50 doses of flu vaccine, which was clearly marked for the Medical Department and to "refrigerate upon arrival." However, the package was not refrigerated and it was misplaced for a week even though his staff had asked after it.

(H) In an e-mail dated December 26, 2001, the applicant reported to the Supervisor and Reporting Officer that the K9 program was unstable and in danger of falling apart. In an e-mail dated December 27, 2001, the Reporting Officer told the Supervisor that he "expect[ed] [the applicant] to leave this alone now."

(I) In an e-mail dated January 9, 2002, the applicant told the Supervisor that CDR Y had accused him of "picking on" BMC X because CDR Y had found other cars in the parking lot with invalid decals. The applicant stated that he was trying to administer the rules fairly. He stated that he had "gone over the violations of the UCMJ articles & truly believe [BMC X] has violated every element of those articles. It is impossible to maintain discipline for our junior troops if the senior personnel get away with insubordination & disobeying lawful orders. I have been lied to by [BMC X] 4 times now & his unprofessional behavior is effecting the good order, morale & discipline at Xxxxxx."

(J) On March 10, 2002, the applicant sent an e-mail to the Supervisor reporting "inappropriate/aggressive behavior" on the part of the 8-year-old boy's mother, Mrs. Q, and asking for assistance from a Work-Life counselor. He stated that he had received numerous complaints about Mrs. Q from various residents and that she continued to harass a 10-year-old girl and "threatened to scratch the eyes out of the girl's father." He stated that Mrs. Q had pointed and stared at the girl even though her son was not on the playground. "The girl states that [Mrs. Q's] son stares at her & this scares the girl." The applicant wrote that he had asked YNC X to "address this hostile situation to avoid conflict between the families" but that Mrs. Q was unstable and an explosive conflict was imminent. The applicant wrote that one resident had reported that Mrs. Q tried to run her over and others reported that she was heard yelling at her son and throwing dishes and had locked her son out of the house on certain occasions.

(K) On March 23, 2002, Mrs. Q e-mailed the Supervisor that she could not understand the applicant's accusations because she had never pointed or stared at his daughter. She stated that she did watch the girl "because she would tease and torment my eight year old son" and that when she complained to the applicant, the torment had gotten worse. "I have found my child crying more times than I would like to count because of [the applicant's] daughter. ... She tells children that my child goes to school with that my child is 'evil and wrong and nobody is allowed to talk or play with him.' I heard his daughter say this, and I went to Work-Life. So after that I would watch my child while he was playing outside. But I find it strange that every time I would look over to his daughter she would already be looking my way." Mrs. Q stated that the applicant's yard was the only view she had out of the front of her house, but the applicant considered her to be staring, whereas it was his daughter that was staring at her. She stated that she wanted "to know why [the applicant] keeps singling out my family, why does he hate my family so much that he keeps trying to destroy our lives. ... [He] has now made me feel unsafe, I am afraid to leave my own home. The police told me I should leave all of my blinds and door shut because if [the applicant or his wife] see me they could place a restraining order against me."

(L) On March 25, 2002, the Supervisor e-mailed the applicant about Mrs. Q's e-mail. He stated that he thought Mrs. Q felt "in a spotlight" since the applicant's wife had called the police about Mrs. Q staring at the applicant's daughter. The Supervisor stated that a Work-Life counselor would be reviewing "all families involved" and

instructed the applicant to leave Mrs. Q's family alone. He told the applicant to have Mr. Q counseled by his immediate supervisor if it were necessary. The Supervisor stated that except in an emergency situation, no one should call the police again without his knowledge. He stated that "we do not need to be involving local police departments because people 'are staring at each other.'"

(M) On March 25, 2002, the applicant replied that he could not understand how the Supervisor could have sent such a message. He claimed that he had "minimal to zero" contact with Mrs. Q and her family and that the State Department of Youth and Family Services had said that Mrs. Q's behavior was harassing to his daughter and that it should be documented with a police report. The applicant stated that the problem with Mrs. Q and her family involved many families, not just his own; that it preceded his arrival at the base; and that residents gossiped about them and were antagonistic toward her because of past incidents. The applicant stated that his family became involved when his daughter asked Mrs. Q's son why he was staring at her. The boy ran into his house crying. Since then, Mrs. Q had been harassing and intimidating his daughter by staring at her.

The applicant stated that he was not persecuting anyone or making Mrs. Q's life unlivable and that her accusations were ludicrous. He stated that he needed the Supervisor's help because if Mrs. Q believed that he was the cause of her problems, she might hurt his child. He asked the Supervisor to order Mrs. Q and her family to leave his family alone. He stated that "[r]egardless of who stared at who first (child to child) ... [Mrs. Q's] behavior is anti-social & disruptive to the community."

(N) On April 4, 2002, Mrs. Q wrote that at 3:30 that afternoon, she saw the applicant's daughter watching her from the fence in Mrs. M's backyard. Mrs. Q wrote that she panicked and backed away from her door and that the girl also went away but then came back. She called a neighbor on the telephone to ask him to witness what was happening, and he did. Then she saw that a community ombudsman was at the playground and walked there to talk to her and others about what had happened, and they saw that the girl was still watching her. Two members, CPO Z and PO1 C, went to the neighbor's house to talk to the applicant's wife, who was visiting there, but Mrs. M was "very verbal to them and was not cooperative."

(O) In an e-mail dated April 8, 2002, the Supervisor, in response to an e-mail from the applicant stating that YNC X had requested reassignment, stated that he needed to talk to YNC X about why he "no longer cares to answer to you." The Supervisor also stated that he was disturbed by the fact that the applicant's own wife had become involved in a housing/family issue. He stated that "[t]his nonsense has to stop immediately and I will speak to you at length when you are here tomorrow. Lift any 'no contact' orders that you imposed (without the CO's approval by the way) immediately. Further, leave [Mrs. Q's] family alone; that includes any member of your family

and do not call any other agency or federal reservation on their behalf. I will deal directly with this situation from now on. Let that family alone and live in peace.”

(P) Later on April 8, 2002, the applicant sent an e-mail to the Supervisor stating that the Work-Life counselor had agreed with his wife that she had no choice but to call the police due to the level of harassment from Mrs. Q. The applicant stated that his own family had a right to be free of harassment and that it was negatively affecting his children. He stated that Mrs. Q had run out of her house “crying apparently because a child was looking at her” and “seems extremely paranoid.” The applicant also stated that the two members who went to the neighbor’s house to talk to the mothers had been “abusive by using reproachful language.” The applicant stated that the women were shocked and frightened by CPO Z’s language.

(Q) An attorney who visited Mrs. Q with the Supervisor in April 2002 stated that Mrs. Q reported that the applicant’s wife would glare at her and that she and another spouse had laughed at Mrs. Q. He stated that Mrs. Q was very emotional and broke into tears several times. When the Supervisor asked her to show him where these incidents occurred, Mrs. Q refused to leave the house for fear of being seen with him and being labeled a “tattletale” or complainer. The attorney concluded that, whatever the validity of Mrs. Q’s allegations, “her tears, emotional state, desire to leave Xxxxxx as soon as possible, and lack of willingness to leave her house point to a negative and hostile environment that existed on the Station Xxxxxx base at that time.”

(R) An e-mail from the Engineering Officer dated April 25, 2002, indicates that the approximate cost of the propane pool heater up to that point was \$4,600 plus “another \$700 to \$1,000 for the electrical connection.” He complained to CWO Z about the lack of planning, the lack of cost considerations, and the possibility that the safety and engineering code requirements had not been met.

(S) On April 16, 2001, Mr. Q e-mailed to the Supervisor that his immediate supervisor had told him that the applicant’s wife was accusing him of “trying to steer [sic] at her. I’m not trying to get people in trouble, but it appears to me that she’s just constantly trying to find some sort of problem with me and my family. I don’t know what to do about this; I avoid them as much as humanly possible.”

(T) On April 26, 2002, the Reporting Officer informed the Supervisor that the applicant’s move back to Staten Island had been arranged.

Statement of the Deputy Commander of XXXX, Reporting Officer for the OER

The Reporting Officer stated that while the applicant may believe that the disputed OER was based on false information, it was justified, accurate, and fair “in the eyes of people who had to deal with the results of his actions and inactions.” He stated that the applicant was relieved of duty “for a multitude of reasons.” With respect to the

applicant's allegation (1), he stated that the applicant had recently been advised not to search a barracks without permission from the Commander, XXXX, or a military judge. He stated that "[t]hough [the applicant] claims that he knew nothing of the search before it happened, I remember at the time that the scenario seemed contrived considering that [the applicant] was the officer responsible for the [PX] that was broken into." He stated that the applicant should have told CWO X to wait for permission before conducting any search.

Regarding the applicant's allegation (2), the Reporting Officer stated that "I am the one who didn't like the way [the applicant] handled the incidents that resulted from my having to send a petty officer ... for a psychiatric evaluation. Two of [the applicant's] supply personnel, who disagreed with the decision, were running an email battle, attacking the victim, which reached throughout the service. They even sent unsolicited input directly to the tending physician at Walter Reed. [The applicant] had a very hard time supporting the Command, which sent the message to his staff that he agreed with them and their tactics. His hands-off approach forced [the Supervisor] and me to intervene."

Regarding the applicant's allegation (3), the Reporting Officer stated that the applicant and BMC X had previously "clashed on several issues about the roles of the support xxxxxxxx and the tenant operational units. This particular incident was about an outdated vehicle sticker, when at the time, everyone else was concentrating on real security matters and supporting a six-fold increase in personnel and a ten-fold increase in vessel support for the 9/11 response. [The applicant's] zeal in driving home his point to the chief looked petty and was way out of proportion to the seriousness of the matter. Once again, [the Supervisor] had to step in to defuse the situation."

Regarding the applicant's allegation (4), the Reporting Officer stated that Mrs. Q's complaint resulted from "a relentless assault by [the applicant's wife], who had no personal connection with the case, on that woman and her family. [The applicant's wife] wanted that family to leave Xxxxxx. ... We even went so far as moving the family to another part of the housing area out of the direct line-of-sight of [the applicant's wife], but that didn't stop the abuse either. [The applicant] totally failed to contain the situation."

Regarding the applicant's allegation (5), the Reporting Officer stated that CWO X "told me that [the applicant] never seemed to be at work, and I apparently relayed that statement to [the Supervisor]. This came up when I was at Xxxxxx trying to quell yet another 'misunderstanding' between the Xxxxxxxx and an operational unit. What it meant to me was that [the applicant] and his Chief did not project enough presence to make the Station Commanding Officer feel any need to look very hard for him, or that the usual degree of assistance given did not normally meet the unit's expectations."

The Reporting Officer stated that he agreed that the marks on the disputed OER were not “reasonably comparable” to the written comments. However, under the rules, the marks are supposed to compare reasonably not to the comments, but to the written performance standards for each category on the OER form. In this respect, he alleged, the disputed OER is “right on.” He stated that the Supervisor marked the applicant in accordance with the written standards on the form. He explained the paucity of negative comments in the OER by saying that “no one ever writes explicitly on the negative items, fearing the instant destruction of an officer’s career.” Instead, they expect savvy readers of an OER to “read between the lines.” The Reporting Officer stated that although the applicant did an excellent job as an ADO, he could not apply “a consistent, reasoned approach to a long-term endeavor and handl[e] the intricacies of the personnel problems that accompany such endeavors. [The applicant’s] tendency to focus on the wrong things and his inability to keep his family situation from affecting the workplace led to his ultimate return to Staten Island.” He stated that his own comments in the disputed OER pointed out that the applicant was “a talented officer in the wrong job,” which resulted in the mark of 4 on the Comparison Scale.

Statement of the Commander of XXXX, the Reviewer of the OER

RADM Y, who began serving as Commander, XXXX, on March 15, 2002, stated that he learned that the Reporting Officer and others had had to “run interference to quell disputes” on a few occasions when the applicant “was believed to be party to or unable to resolve and might actually be causing to worsen [the situation].” When he asked about the mediocre marks on the disputed OER, both the Reporting Officer and the Supervisor stated that the applicant “lacked the leadership, management, administration, conflict management, team building, and interpersonal skills needed for the position.” They told him they had “highlighted the positive performance areas in the OER but did not provide the negative performance. Instead they provided the overall performance marking that accurately reflected the balance of the entire period of the report.” He stated that he “could not support removal or reconsideration of the marks based upon the input I received from [the applicant’s] direct supervisors.” He stated that he moved the applicant to another billet because he did not want him to fail.

RADM Y stated that while discussing events at an exit interview with the applicant, he did say that he “did not know the full range of challenges that he had before him as supervisor of the facilities and tenants of Xxxxxx. I also indicated that his supervisor had not made me fully aware of the problems being addressed. However, I did not indicate that things were worse now than before when he was supervisor as that was not the case.” The Commander stated that after the Supervisor’s departure, he discovered that “the unit records and logistics support functions were ... woefully below standards. This does not excuse [the applicant’s] performance but explains why he may not have received the level of oversight expected of his immediate supervisor.” He also opined that the Supervisor “did not like to give bad news nor hear bad news.”

Memorandum of the Coast Guard Personnel Command

CGPC stated that the applicant's allegation that the numerical marks in the OER are inconsistent with the comments is unfounded because a "mark of four is the standard performance mark that describes the high level of performance expected of all Coast Guard officers." CGPC argued that the written comments "compare reasonably with the picture defined by the standards marked in the performance dimensions of the disputed OER, as required by policy."

With respect to the applicant's allegation (1), CGPC stated that the applicant provided no evidence to support his claim that the Supervisor lowered his marks based on an erroneous belief that the applicant had searched the barracks after the burglary at the PX. Moreover, CGPC pointed out, the statements of the Supervisor and Reporting Officer, refute this allegation in that they indicate that they knew that CWO X conducted the search and disapproved of the applicant's failure to prevent it from happening since he had recently been counseled about such matters.

With respect to the applicant's allegation (2), CGPC stated that the applicant presented no evidence to support his claim that the Supervisor lowered his marks based on an erroneous belief that the applicant was present and responsible for how a petty officer's threats were handled. CGPC pointed out that both the Supervisor and Reporting Officer have stated that it was how the applicant responded to his staff members' improper actions afterwards that dissatisfied them.

With respect to the applicant's allegation (3), CGPC stated that it is clear from the Supervisor's statement and an e-mail he submitted from the applicant to him that it was not the Supervisor but CDR Y, Chief of the Response Division, who accused the applicant of picking on BMC X because of his outdated decal. CGPC pointed out that both the Supervisor and Reporting Officer apparently felt that poor leadership by the applicant over a relatively minor issue "escalated [the issue] to a level that required higher-level intervention to defuse."

With respect to the applicant's allegation (4), CGPC stated that while the situation was clearly "very difficult and sensitive," both the Supervisor and the Reporting Officer have provided "supporting documentation ... to justify their concerns with the Applicant's inability to contain the situation" as the officer responsible for supervising the housing at Xxxxxx. CGPC stated that they were entitled to base the marks they assigned on their views of his handling of the situation and that "[w]hile the Applicant may disagree with the views of his Supervisor, he has provided no evidence that there was a violation of policy."

With respect to the applicant's allegation (5), CGPC stated that while CWO X may not recall making the statement about the applicant rarely being at work to the Supervisor, the Supervisor has provided ample evidence from various individuals,

including CWO X, that the applicant was often absent from work. CGPC stated that the Supervisor has provided "very convincing evidence to justify his concern and dissatisfaction with the Applicant's work ethic."

CGPC concluded that in light of the statements of the rating chain and the accompanying documentation, the applicant's allegation that the disputed OER was based on false information is not supported. CGPC pointed out that there are no comments in the OER that specifically concern the applicant's five allegations of error but that the Supervisor "was well within his right to consider them in his evaluation of the Applicant's performance."

Regarding the Comparison Scale mark, CGPC stated that it "reflects the Reporting Officer's ranking of the Reported-On Officer relative to all other officers of the same grade the Reporting Officer has known. The mark represents a relative ranking of the Reported-On Officer, not necessarily a trend in performance. ... [T]he mark, by policy, is based solely on the experience, judgment and discretion of the Reporting Officer."

Regarding the applicant's complaint about a lack of counseling, CGPC stated that counseling may take place informally or formally and that the Supervisor has contradicted the applicant's claim and provided e-mail messages that he sent the applicant with counseling. Moreover, CGPC stated, under the Personnel Manual, the applicant was responsible for managing his own performance and obtaining sufficient performance feedback.

In light of the statements by the rating chain and CGPC's memorandum, the JAG argued that the OER should not be removed from the applicant's record because he has failed to prove a "clear and prejudicial violation of a statute or regulation, or alternatively, a misstatement of a significant hard fact." *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992). He argued that the applicant has failed to overcome the presumption that his rating chain prepared the OER "correctly, lawfully, and in good faith." *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); see 33 C.F.R. § 52.24(b). The JAG alleged that the "record establishes that the OER was properly prepared in accordance with the Personnel Manual, it represents the honest professional judgment of the Supervisor and Reporting Officer, and accurately reflects Applicant's actual performance during the period of the report."

The JAG argued that the applicant's argument that the marks in the disputed OER are lower than others he has received during his career is irrelevant, citing *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981), in which the court held that "the fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied." The JAG concluded that the challenged OER in this case "represents the honest professional judgment of the Supervisor and Reporting Officer" and should not be removed.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 2, 2005, the applicant responded to the views of the Coast Guard. The applicant repeated his allegations that the marks in the OER were based on the Supervisor's misunderstanding of his performance in five situations. Regarding the Coast Guard's views on his allegation (1), the applicant stated that he had no previous knowledge of and was not present at the unauthorized barracks search by CWO X. Regarding allegation (2), the applicant stated that he had no knowledge of his staff members' e-mail campaign until after the fact and that he immediately prepared a negative "page 7" entry documenting her actions. He submitted a copy of the page 7, dated August 23, 2001, which was to be signed by the Supervisor. Regarding allegation (3), the applicant alleged that BMC X's behavior gave him "no choice but to report him," and that his own handling of the problem was "obviously appropriate and necessary under the circumstances."

Regarding allegation (4), the applicant alleged that the situation with Mrs. Q and her family was neither caused nor escalated by himself or his family. The applicant alleged that the Supervisor's submissions indicate that he relied solely on Mrs. Q's version of events in finding fault with the behavior of the applicant's family, which was "irresponsible and unethical." The applicant also submitted a copy of a charge sheet he completed on CPO Z, who responded to Mrs. Q's complaint about his daughter staring at them by going to the neighbor's house to speak to the applicant's wife and other adults. The charge sheet shows that he charged CPO Z with breach of peace by "wrongfully using abusive, provoking, and reproachful language toward" the applicant's wife, the neighbor, and the neighbor's mother; with assault by lunging and raising his hand while using threatening words so as to put the neighbor's mother "in apprehension of being struck"; with using indecent language in the presence of children; and with communicating a threat.

Regarding allegation (5), the applicant stated that the accusation that he was never at work "is clearly a false statement coming from one source—[CWO X]—who has contradicted himself throughout this process depending on who was asking for his input. ... His assertions are therefore suspect and should be deemed unreliable." The applicant alleged that he was consistently at his office and was often there after hours.

The applicant stated that marks of 4 in an OER are well known throughout the service as "damning by faint praise." He pointed out that RADM Y called the OER marks "mediocre" and asked the Supervisor and Reporting Officer to explain them. Moreover, the applicant alleged that RADM Y has called into question the Supervisor's own leadership abilities by saying that he did not like to "give bad news, nor hear bad news" and that the applicant "may not have received the level of oversight expected." The applicant alleged that the Supervisor has "been shown repeatedly to be an inade-

quate leader," which "casts serious doubt upon the credibility of any of [the Supervisor's] assertions as well as his justifications for performance evaluation marks."

In support of his allegations, the applicant submitted several signed statements, including the following (which are lettered consecutively with his prior submissions):

(I) YNC X stated that he "always observed [the applicant] at work during normal work hours in uniform prescribed by regulations" and that if the applicant was unable to be in the office during the day, he was there in the evening. YNC X stated that after 9/11 everyone in their office "was putting in a 16-20 hour workday trying to procure supplies and parts for the numerous patrol boats responding, buying needed emergency supplies, cooking food for the many boat crews and support personnel 24 hours a day, finding and arranging lodging for the numerous additional personnel arriving every day, processing the mountain of administrative work. ... This continued until November without a let up. [The applicant] was in the midst of this keeping track of everything that my team was doing and giving direction and guidance to new upcoming issues." He stated that the applicant had a "good work ethic."

YNC X stated that he was unaware of any issues between the applicant's and Mrs. Q's families except that Mrs. Q accused the applicant's daughter of sticking her tongue out at her son. He stated that because he could not find adequate off-base housing, Mrs. Q's family chose to stay at Xxxxxx. YNC X also stated that the applicant reacted in a professional manner following the suicide of a chief petty officer.

YNC X stated that BMC X, the station XPO, was "very unstable in character" because he would watch and take notes on other families' behavior and complain when they broke rules. He alleged that BMC X also tried to get a chief petty officer in trouble by lying about him. He stated that BMC X also would complain about the lack of administrative support from the applicant's office at a time when the office only provided support for "supply, housing, facilities engineering, and the armory," and it was BMC X's own duty to provide administrative support for his unit. YNC X stated that after 9/11, BMC X ignored a direct order by the applicant to get a valid Coast Guard sticker and got a DOD sticker instead.

(J) YNC M stated that the applicant "was regularly in the office and in uniform" and "also stayed late many times, long after others had gone home." She stated that some days he was out of uniform because he "had physical therapy scheduled due to a car accident."

YNC M stated that BMC X was one of the people at Xxxxxx who "felt that they were above the rules and would not comply" with the order to have a valid decal. YNC M stated that although she spent days issuing new decals and "never turned anyone away," BMC X refused to find the time to get one until December, three months after he was asked to do so. YNC M stated that whenever the guards at the gate asked BMC X

about the decal he would "belittle/berate them." She stated that as the station XPO, he should have been setting an example. Instead, he "seemed to enjoy causing strife."

(K) The applicant's wife stated that sometime after 9/11, the applicant told her that Mrs. Q had complained that their daughter had stuck out her tongue at Mrs. Q's son. The applicant had told Mrs. Q "that they were children, what did she want him to do," but Mrs. Q was upset. So they told their daughter not to stick out her tongue at others. Their daughter responded by saying that she was nervous when Mrs. Q or her son would stare at her and that "other children told her they were not allowed to play with [the son]." The applicant's wife stated that when she tried to discuss the matter with Mrs. Q, the latter complained that Mrs. M, who lived next door to Mrs. Q, was spying on her family and that her son was not allowed to play with other children. Thereafter, the applicant spoke with Mrs. M, who denied spying on Mrs. Q, and the applicant and YNC X built a fence between their houses, so that Mrs. M would have to walk around Mrs. Q's property to visit the applicant's wife.

Thereafter, the applicant's wife stated, her daughter "became withdrawn and was unnerved because of what I consider [Mrs. Q's] malevolent behavior towards my daughter. Other residents would also mention to me that [Mrs. Q] seemed to be trying to intimate my 9-year-old daughter ... [who] was afraid to go outside & started having nightmares because of [Mrs. Q's] behavior." Therefore, the applicant's wife contacted the police, "unbeknownst to my husband," "to document what they stated was abusive behavior towards a minor." She alleged that the police stated that "cases like this would lead to further abuse and potentially physical abuse if not documented and interceded early." She alleged that she wanted to resolve the situation with Mrs. Q "as parents" but her husband told her he could not speak to Mr. or Mrs. Q. She further alleged that "[s]ome residents stated that they respected and liked me but would not trust me if I continued to be friends with [Mrs. M]," but her husband told her not to let others choose her friends for her.

The applicant's wife stated that the Work-Life counselor told her that the best solution would be for Mrs. Q's family to move off of the Xxxx as Mrs. Q "was not allowing the situation to be resolved." She alleged that he told her that Mrs. Q saw the applicant's family as "perfect" and was jealous and "lashing out." Therefore, she and the applicant began looking for non-Government housing.

The applicant's wife stated that in April 2002, two members came to Mrs. M's porch and said that their children were staring at Mrs. Q. Therefore, she called the children and had them play inside. However, CPO Z began screaming and cursing at Mrs. M and blaming her for all the problems on Xxxxxx. The applicant arrived and mediated the situation, and thereafter Mr. M built a privacy fence "to avoid any more potential staring from the children."

(L) SK1 P stated that the applicant “was available in his office during and after hours. ... During the closing of the [fiscal year], I always worked late and he was in his office signing any documents I needed to perform my job. ... During the WTC operation, [the applicant] ... was available day and night whenever the duty personnel called him.”

(M) A Coast Guard auxiliarist stated that the applicant “was a strong person who made improvements to facilities, working environment, and really cared for his people. He did all these things while dealing with everyday problems and adversities, including the terrible attack on America of 9/11.”

(N) Another auxiliarist stated that the applicant was a professional who “use[d] his work ethic to restore Xxxxxx. He worked on the grounds, the electronic gate was repaired and work areas improved. He did these and many more while standing duty not only at Xxxxxx but Xxxxxxx xxxxx [and] would come in to Xxxxxx Office at night. [BMC X] tried to blame everyone else for the assignments he couldn’t accomplish ... and wouldn’t sign auxiliarist orders to volunteer at the Xxxx.”

The applicant also submitted e-mails from others who praised his performance of duties in prior and later assignments. In addition, he submitted copies of e-mail communications he initiated with various officers after receiving the disputed OER.

APPLICABLE REGULATIONS

Article 10.A. of the Personnel Manual in effect in 2001 and 2002 governed the preparation of OERs. Article 10.A.1.b.1. provides that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.1.c.5. states that “[n]o specific form or forum is prescribed for performance feedback except for ensigns and lieutenants (junior grade). Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, each officer should be clear about the feedback received. If the feedback is not fully understood, it is the Reported-on Officer’s responsibility to immediately seek clarification.” Article 10.A.2.c.2.e. states that it is a Reported-on Officer’s responsibility to seek feedback on his performance as necessary. Article 10.a.2.c.2.k. states that an officer “[a]ssumes ultimate responsibility for managing [his] own performance, notwithstanding the responsibilities assigned to others in the rating chain. This includes ensuring performance feedback is thorough” Article 10.A.2.d.2.e. provides 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.4.c.4. of the Personnel Manual provides that a Supervisor should assign the Reported-on Officer marks in the first thirteen performance categories as follows (the same instructions are provided for the Reporting officer, who completes the remainder of the OER):

b. For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards [on the OER form] and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards—not to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct 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. ...

• • •

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.2.e.2.a provides that in preparing an OER, the Reporting Officer "[b]ases [his] evaluation on direct observation, the OSF or other information provided by the Supervisor, and other reliable reports and records." Article 10.A.4.c.8.a. states that the Reporting Officer completes the Comparison Scale by "fill[ing] in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known." Article 10.A.4.c.9. provides that in block 10 of an OER, the Reporting Officer "shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard."

Article 10.A.2.f.2. provides that it is the responsibility of the Reviewer to ensure that an OER "reflects a reasonably consistent picture of the Reported-on Officer's performance and potential."

Article 10.A.4.g. allows an officer to file a reply to his OER, within 15 days of receiving a copy of it, to "express a view of performance which may differ from that of a

rating official.” The reply is forwarded up the rating chain, whose members may attach written responses, before being entered in the officer’s record with the OER by CGPC.

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 10 U.S.C. § 1552. 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. Absent specific evidence to the contrary, the Board presumes that an applicant’s rating officials acted “correctly, lawfully, and in good faith” in making their evaluations.³ Once an applicant has rebutted the presumption of regularity by presenting at least some evidence that “specifically and convincingly contradicts his rating officials’ marks and comments,”⁴ the Board weighs the evidence in the record to determine whether the applicant has met his burden of proof—the preponderance of the evidence—with respect to the disputed OER.⁵ The Board determines whether the applicant has proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁶ With this standard in mind, the Board has carefully considered all of the evidence regarding the disputed OER and draws the following conclusions with respect to the evidence.

4. The applicant argued that the marks in the disputed OER are erroneous and cited as evidence the fact that they are lower than the marks he received in OERs for assignments before and after his assignment to Xxxxxx. The Board notes that the disputed OER is the first that the applicant received as a lieutenant commander. Moreover, as the JAG argued, the fact that the applicant has received better OERs during his career does not prove that the marks in the disputed OER are erroneous.⁷

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); see 33 C.F.R. § 52.24(b).

⁴ See CGBCMR Docket No. 2000-194.

⁵ 33 C.F.R. § 52.24(b). In determining the preponderance of the evidence, the Board continues to consider the evidentiary weight of the rating chain’s assessment even though the presumption of regularity has been rebutted. See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.10 (1981).

⁶ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980); CGBCMR Docket No. 86-96.

⁷ *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981) (holding that “the fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied”).

5. The applicant argued that the marks in the disputed OER are erroneous because they are “wildly inconsistent” with the corresponding written comments. Article 10.A.2.f.2. of the Personnel Manual provides that an OER should “reflect[] a reasonably consistent picture of the Reported-on Officer’s performance and potential.” However, under Article 10.A.4.c.4., numerical marks are assigned by comparing the officer’s performance with the written standards on the OER form, and written comments are added merely to support the marks, especially those higher than a 4. After reviewing the marks, the written standards for those marks on the OER form, and corresponding comments in the disputed OER, the Board is not convinced that the comments are so laudatory as to be inconsistent with the marks and corresponding written standards. The fact that the Supervisor and Reporting Officer included many nice comments and details about the applicant’s performance does not prove that the applicant’s overall performance in each of the various performance categories exceeded the assigned mark of 4 or 5 during the evaluation period.

6. The applicant argued that the marks in the disputed OER were based on his Supervisor’s misunderstanding of five situations. There are no specific comments concerning the applicant’s five allegations in the OER. Moreover, the Supervisor stated in his declaration that the marks in the OER were not based merely on the five situations identified by the applicant but on a “multitude of mishaps and blunders” that resulted in the applicant’s removal as supervisor of XXXXXXXX XXXXXX and in the disputed OER. The Supervisor also indicated that a primary consideration was the applicant’s conflicts with the tenant commands at XXXXXX. The Supervisor’s statements were strongly supported by the Reporting Officer, who stated that he himself was dissatisfied with the performance of the applicant, who was relieved of duty for a “multitude of reasons.” In support of his allegations, the Supervisor submitted statements from CWO X, CWO Z, and CPO Y, who strongly criticized the applicant’s performance.

7. The applicant alleged that his Supervisor mistakenly believed that the applicant searched the barracks or acquiesced in CWO X’s search of the barracks after a burglary at the PX and that this mistaken belief caused his marks to be lowered. The declarations of the Supervisor and Reporting Officer clearly indicate that they knew that CWO X searched the barracks but believed that the applicant wrongly allowed the search of the barracks even though he had recently been warned that only a military judge or the Commander, XXXX, could authorize the search of a barracks. The Reporting Officer stated that the “scenario seemed contrived considering that [the applicant] was the officer responsible for the PX that was broken into.” The Board notes that in CWO X’s statement on behalf of the applicant, he wrote that he received permission to search the barracks from his immediate supervisor, who was not the applicant. However, he did not say that the applicant had no foreknowledge of his search or that he did not discuss the break-in at the PX with the applicant before conducting the search. As supervisor of the XXXXXXXX, the applicant had a duty, once he was warned

following the first improper search, to ensure to the best of his ability that no further improper search was conducted on the base. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the Supervisor and Reporting Officer were wrong in finding fault with his performance in connection with the second improper search or in believing that he should have prevented it.

8. The applicant alleged that his Supervisor mistakenly believed that he improperly handled a situation in which a petty officer threatened a corpsman despite the fact that he was away on leave at the time and did not learn of the threat until after the Reporting Officer had handled the situation by ordering a psychiatric evaluation for the petty officer. The declarations of the Supervisor and Reporting Officer show that they were not mistaken about the applicant's lack of involvement on the day of the threat but were dissatisfied with how he handled the subsequent improper actions of his staff members on behalf of the petty officer. The applicant submitted a copy of a page 7 documenting the improper actions for one staff member's record. However, the record also contains evidence that his response was considered inadequate by the base chiefs, who therefore held a Chiefs' Mast, and that he excessively delayed submitting a special performance evaluation to document his staff member's misdeeds. The Supervisor and Reporting Officer concluded that the applicant only reluctantly supported the Reporting Officer's decision. The applicant has not proved by a preponderance of the evidence that his Supervisor or the Reporting Officer were mistaken about how he responded to his staff members' subsequent improper reactions.

9. The applicant alleged that his Supervisor mistakenly believed that he was "picking on" BMC X by attempting to bring UCMJ charges against him for failing to acquire a valid decal and that this mistaken belief caused his marks to be lowered. The record indicates that it was not the Supervisor but BMC X's own supervisor who accused the applicant of "picking on" BMC X. Statements by a senior chief petty officer, YNC X, and YNC M strongly support the applicant's allegation that BMC X behaved improperly about the decal. The applicant, however, has not proved that the Supervisor or Reporting Officer were mistaken in their understanding of BMC X's behavior or of the applicant's response. While he believed that criminal charges were justified, his rating chain clearly believes that his response was due in part to past conflicts between himself and BMC X and that a more skillful leader could have handled the situation better and without causing BMC X's chain of command to complain. Although the applicant has proved that BMC X's behavior was unacceptable, he has not proved that his Supervisor and Reporting Officer were misinformed of BMC X's behavior or of his response to it. He has not proved that their separate, necessarily subjective judgments that the applicant's response was "petty" and "way out of proportion" and that he could have handled the problem better were erroneous.

10. The applicant alleged that his Supervisor mistakenly believed that he and his family were causing Mrs. Q's life to be "unlivable" and exacerbating conflicts among residents instead of ameliorating them. He alleged that this mistaken belief caused his

marks to be lowered. The statements by the Supervisor and the Reporting Officer indicate that they found at least some of Mrs. Q's allegations to be credible, whereas the applicant believes that Mrs. Q was paranoid, irrational, abusive to his child and her own, and quite mistaken about his own conduct and the conduct of his daughter, his wife, and Mrs. M. His wife supports him in his characterization of Mrs. Q and their own actions. The tone and content of Mrs. Q's e-mails suggest that she was highly distraught, that she improperly reacted to hurtful statements the applicant's daughter made about her son by "watching" or "staring at" the daughter, and that she may have overreacted to the warnings of the police. In addition, the applicant submitted evidence that Mr. and Mrs. Q either failed or long delayed to get counseling for their son, as ordered by the State.

11. In the applicant's e-mail to the Supervisor dated March 10, 2002, he attempted to hide his family's involvement in the issue by referring to a "10-year-old girl" without identifying her as his daughter and by stating that Mrs. Q "threatened to scratch the eyes out of the girl's father"—i.e., himself. The Supervisor's statement indicates that he noted the applicant's deception by omission after receiving an e-mail from Mrs. Q. Moreover, the Board notes that on March 10, 2002, the applicant told the Supervisor that he had asked YNC X to "address this hostile situation to avoid conflict between the families," but YNC X recently stated that he was unaware of any issues between the applicant's and Mrs. Q's families except that Mrs. Q had accused the applicant's daughter of sticking her tongue out at his son. Therefore, it appears that if the applicant did hand the problem to YNC X, he did so without adequately informing him of the scope of the hostilities or admitting the extent of his own family's involvement.

12. The record indicates that increasing hostilities between Mrs. M, Mrs. Q, the applicant's wife, and their children spread conflict among residents of Xxxxxx. The applicant's wife stated that some residents told her that they would no longer trust her if she remained a friend of Mrs. M. The Supervisor stated that the Work-Life counselor told him that the applicant contributed to the conflicts by "violating command confidentiality," which increased gossip. The Reporting Officer (presumably also based on reports) concluded that the applicant's wife was "relentless" in trying to get Mrs. Q's family moved off the Xxxx and that the applicant "totally failed to contain the situation." The record also contains other serious allegations about the applicant's inappropriate comments to residents and children. Although the applicant was clearly faced with an extremely difficult and delicate situation with respect to Mrs. Q and her son and their accusations against his family, he has not proved by a preponderance of the evidence that his Supervisor and Reporting Officer were mistaken in their understanding of the situation or of his response to it. He has not proved that they were mistaken in their belief that he could have and should have better handled the difficult conflicts that arose between the residents of Xxxxxx.

13. The applicant alleged that his Supervisor mistakenly believed that he was rarely at work and that this mistaken belief caused his marks to be lowered. He submit-

ted statements by YNC X, YNC M, ET1 M, SK1 P, and an auxiliarist indicating that he was regularly at work and in uniform and often worked late. CWO X told the Reporting Officer, however, that the applicant "never seemed to be there." CWO X related an incident from which he concluded that the applicant had been "hiding in his home" to avoid dealing with a problem. CWO X also stated that the applicant claimed to have been spending a lot of time at XXXX but he learned from LT F that this was not true. The ADO watch rotation manager stated that the applicant stopped serving as an ADO at XXXX in July 2001. LT F reported in November 2001 that the applicant skipped a meeting with her to take his daughter to the dentist and that both CWO X and another member told her that the applicant was "rarely there." CPO Y complained in April 2002 that the applicant must have "what appears to me to be a very different work schedule than most of us which ... does make it difficult to conduct business on a daily basis if he is not there. It just seems to most of the senior personnel here at Xxxxxx that when something needs his attention he has been very difficult to track down." This evidence indicates that the applicant's own staff was satisfied with his work habits but that others often could not find the applicant when they needed him. The Reporting Officer, noting that the applicant lived a few yards from his office, concluded not that the applicant was actually absent from the base a lot, but that the applicant "did not project enough command presence." The Supervisor did not state that he believed that the applicant was never at work but that the complaints of other officers led him to question the applicant's performance and contributed to the mark of 4 he assigned the applicant for the performance category "Results/Effectiveness." The Board finds that the applicant has not proved by a preponderance of the evidence that his Supervisor and Reporting Officer were mistaken about his work ethic or erred in taking the complaints of other officers into account in assigning the numerical marks in the disputed OER.

14. The applicant stated that CWO X was the source of misinformation about his work habits and that CWO X was not a reliable witness. He pointed out that CWO X sent him an e-mail saying that he cannot remember ever discussing the applicant's attendance at Xxxxxx with the Supervisor. He alleged that this contradicted CWO X's comments about his work ethic elsewhere in the record. However, the record contains no evidence that CWO X ever communicated with the Supervisor directly about the applicant's alleged absences, and CWO X's e-mail to the applicant was in response to a direct query from the applicant about whether CWO X had ever told the Supervisor that the applicant was "never at Xxxxxx." The fact that CWO X did not admit to the applicant that he had complained about the applicant's work habits to officers other than the Supervisor does not persuade the Board that CWO X is not a creditable witness in this case. Moreover, CPO Y statement in 2002 strongly supports CWO X's complaints about the applicant's work hours and availability to handle problems at Xxxxxx.

15. In his declaration, the Reviewer for the disputed OER, RADM Y, criticized the Supervisor's own performance and suggested that the applicant "may not have

received the level of oversight expected of his immediate supervisor.” RADM Y also opined that the Supervisor “did not like to give bad news nor hear bad news.” The applicant alleged that the Supervisor failed to counsel him about his performance during the evaluation period. However, the record contains several e-mails concerning Mrs. Q that indicate that the Supervisor promptly responded to “bad news” from the applicant and, rather than ignoring problems, assumed the responsibility for resolving them himself. The Supervisor’s e-mail dated November 16, 2001, indicates that the Supervisor was not averse to giving the applicant “bad news” either. The Supervisor stated that he provided the applicant with both written guidance and “constant verbal feedback.” In addition, he stated that the applicant was called into the Reporting Officer’s office for counseling several times. Article 10.A.1.c.5. of the Personnel Manual states that “[p]erformance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments).” The Board finds that the applicant has not proved by a preponderance of the evidence that the Supervisor failed to provide him with sufficient counseling and oversight during the evaluation period or that any leadership deficiencies on the part of the Supervisor caused him to be removed from his position at Xxxxxx.

16. The applicant’s OER indicates that he successfully completed a great deal of work during the evaluation period. Several statements in the record show that some leaders of the Xxxxxx community were very pleased with his performance. Their statements about improvements to facilities, security, and community relations, however, do not prove that his Supervisor or Reporting Officer relied on inaccurate information in assessing his performance. The record shows that the applicant made significant improvements at Xxxxxx, that his work was appreciated by many people, and that he performed many difficult tasks well under trying and stressful circumstances. Nevertheless, the Board cannot find on the basis of the record that the applicant’s rating chain erred in removing him from the position at Xxxxxx or in assigning him primarily marks of 4 and 5, given the written standards for those marks on the OER form.

17. The record contains many allegations by the applicant and others about the problems at Xxxxxx and the applicant’s performance. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

18. The applicant has not proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process” (such as a significant misunderstanding on the part of the Supervisor or Reporting Officer of the applicant’s skills and performance), or a prejudicial violation of a statute or regulation.⁸

⁸ *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

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

ORDER

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

Toby Bishop

J. Carter Robertson

Eric J. Young