

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2008-106**

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XXXXXXXXXXXXXXXXXXXXX

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**FINAL DECISION**

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 April 18, 2008, upon receipt of the applicant's completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated February 12, 2009, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**PAST BCMR DECISION AND TECHNICAL AMENDMENT**

In BCMR Docket No. 2006-085, this applicant asked the Board to remove his officer evaluation report (OER) for the period April 1, 2002, to March 31, 2003 (hereinafter 2003 OER), when he was serving as the School Chief of the Coast Guard's xxxxxxxxxxxxxxxx (xxxxxx) School at the Training Center in Yorktown. The OER contained five low marks of 3, ten marks of 4, and three marks of 5 in the various performance categories and a mark in the fourth spot on the comparison scale.<sup>1</sup> While serving in the same billet, the applicant had previously received OERs with marks of 4, 5, and 6 from a prior supervisor and reporting officer. The 2003 OER contained several very negative comments about the applicant's performance, such as "[w]ith O-5 filling O-4 billet for entire marking period, performance/growth of school and its stature in XXXX community less than expected"; "[i]nability to think/act beyond scope of school sometimes limits effectiveness"; "[w]hen motivated, produces good product"; "[t]eamwork not usually visible"; and "produced mostly acceptable results but not what the CG expects from an O-5 filling an O-4 billet." Moreover, instead of recommending the applicant for promotion from commander (O-5) to captain (O-6), the reporting officer wrote that the applicant was not working up to his potential; "[p]roduces good work but appears content with O-4 level of responsibilities"; and was

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<sup>1</sup> In OERs, officers are evaluated in a variety of performance categories, such as "Professional Competence," "Teamwork," and "Judgment," on a scale of 1 to 7, with 7 being best. In addition, the reporting officer completes a "comparison scale" on which he compares the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout his career. The 7 possible marks on the comparison scale range from a low of "[p]erformance unsatisfactory for grade or billet" to a high of "BEST OFFICER of this grade." A mark in the fourth, or middle, spot denotes a "[g]ood performer; give tough, challenging assignments."

recommended only “for positions of responsibility within the XXXX program such as District, Area, or Headquarters XXXX staff.” The applicant alleged that the low marks and negative comments in the 2003 OER were inaccurate, and he attributed the inaccuracy to the fact that the disputed OER was completed by a new supervisor and reporting officer, who did not know or appreciate how much work he had accomplished during the evaluation period. He alleged that the OER would have been much better had it been completed by his properly designated rating chain for the evaluation period. In support of this allegation, he submitted a statement from the commanding officer (CO) of the Training Center, who signed the 2003 OER as the Reporting Officer, even though he was not a designated member of the applicant’s rating chain:

After reviewing the statements of personnel directly involved with [the applicant’s] performance during the marking period, I do not feel that the marks and comments in [his] OER for the above period accurately reflect his accomplishments during the period. The statements provide a substantially different picture than the information I was provided by [his] supervisor.

During the period, I do not believe [the applicant’s] supervisor adequately conveyed the programmatic issues that [the applicant] was actively working to resolve. As a result, I was not made aware of [his] efforts to successfully resolve many of these issues. In addition, the supervisor failed to inform me of [the applicant’s] efforts to standardize curriculum development within the Training Division.

Likewise, I do not believe the supervisor provided an accurate portrayal of [the applicant’s] effort to support the [xxxxx] staff. The statements provided by the personnel who worked for [him] show that he encouraged and supported their professional growth and their personal needs. This again is inconsistent with the information provided in the OER.

In response to the application in Docket No. 2006-085, the Judge Advocate General (JAG) of the Coast Guard admitted, and the Board found, that the applicant’s command had violated Article 10.A.3.a.2.b. of the Personnel Manual by failing to have the 2003 OER prepared by the applicant’s designated Reporting Officer. In the Final Decision for the case, dated December 14, 2006, the Board noted that in BCFR Docket No. 151-87, it was held that “an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.” In light of statements submitted by the applicant’s rating officials, the Board found that the error in the rating chain was prejudicial to the 2003 OER and that “the entire OER appears to have been ‘infected’ by the error and it is ‘impossible or impractical to sever the incorrect/unjust material from the appropriate material.’” Therefore, the Board ordered the Coast Guard to remove the applicant’s OER for the period April 1, 2002, to March 31, 2003, from his record.

Subsequent to the issuance of the Final Decision for Docket No. 2006-085, the JAG requested a technical amendment to the Board’s order pursuant to 33 C.F.R. § 52.73. The JAG stated that the applicant had failed of selection for promotion from CDR to CAPT in 2006 while the application was pending and asked the Board to amend its order to include removing the applicant’s failure of selection. The JAG noted that after the applicant’s record was corrected in accordance with the Board’s order, he had failed of selection again in 2007. However, since the 2003 OER had already been expunged when the applicant’s record was reviewed by the selection board in 2007, the JAG recommended removing only his failure of selection in 2006. Citing *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005), and *Engels v. United States*, 678 F.2d 173,

175 (Ct. Cl. 1982), the Board noted that “when an officer shows that his record was prejudiced before a selection board by error, ‘the end-burden of persuasion falls to the Government to show harmlessness—that ... there was no substantial nexus or connection’ between the prejudicial error and the failure of selection.” The JAG’s request for an amended order included copies of emails from the applicant and CGPC officials regarding his failures of selection. After meeting in person with the applicant about his failures of selection, the chief of the Officer Career Management Branch wrote in an email dated August 14, 2007, that the applicant “believes the PY08 [calendar year 2007] board should count as his first look for O-6.” The Board accepted the JAG’s request as an admission of a substantial causal connection between the erroneous 2003 OER and the applicant’s failure of selection in 2006. Therefore, the Board issued a Technical Amendment to the Final Decision in Docket No. 2006-085 by ordering the Coast Guard to remove the applicant’s 2006 failure of selection for promotion to CAPT.

### **APPLICANT’S NEW REQUEST AND ALLEGATIONS**

In his new application, the applicant asked the Board to correct his record by removing his OER for the period April 1, 2003, through February 29, 2004 (hereinafter 2004 OER); by removing his failures of selection for promotion to captain in calendar years 2007 and 2008 by the promotion year (PY) 2008 and 2009 captain selection boards;<sup>2</sup> by backdating his date of rank if he is selected for promotion to captain after his record has been corrected by removal of the 2004 OER to the date of rank he would have had if he had been selected for promotion in 2006 by the PY 2007 captain selection board; by awarding him back pay and allowances; and by taking any additional actions that would alleviate any negative perceptions that a selection board might draw from the two consecutive continuity OERs he would have in his record.

The applicant alleged that because of the unfair 2003 OER, which was removed from his record pursuant to the Board’s order in Docket No. 2006-085, the commanding officer (CO) of the Training Center in Yorktown reassigned him in May 2003 from his position as the xxxxx School Chief to a lesser position at the Training Center that “did not afford the opportunity to perform at a level appropriate for [his] pay grade, resulting in [a] substandard OER for the period ending [February 29, 2004].” The applicant alleged that his “reassignment was not within the authority of the Commanding Officer [CO] of Training Center Yorktown and was based on inaccurate information on [his] performance.” He argued that under Article 4 of the Personnel Manual, only the Officer Personnel Management Division (OPM) of the Coast Guard Personnel Command (CGPC) may issue transfer orders, and so the CO of the Training Center did not have authority to place him in a billet other than that to which he had been assigned by CGPC. The applicant explained the difference in his assignments as follows:

As the School Chief of the xxxxxxxxxxxx (xxxxx), I was responsible for providing xxxxxxxx training, including personnel and operational safety, minor and major aid maintenance, operational procedures and documentation, xxxxxxxx positioning, xxxxxxxx training, and small boat standardization. I was the supervisor for three officers and fourteen enlisted personnel and managed an annual budget of \$250,000. As School Chief, I managed the preparation of instructors, classrooms, and curricula for approximately forty resident course convenings, eight exportable courses, and twelve training team and standardization team visits per year with an

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<sup>2</sup> The PY09 captain selection board had not yet met when the applicant submitted his application in April 2008. However, he requested this relief prospectively in case he again failed of selection. The applicant was not selected for promotion by the PY09 selection board, which convened on July 14, 2008.

annual student throughput of five hundred students. In addition, the xxxxx staff and I were actively involved in the development of the Integrated Xxxxxxxx Information System and the xxxxxxx Interactive Courseware serving as subject matter experts and developing and reviewing curricula for distribution to field units.

Based upon the opinions presented by my supervisor in the OER for the period ending 31 March 2003, I was removed from my primary duties and reassigned by the Training Center Yorktown Commanding Officer as the Training Center Force Protection Officer. The Force Protection Officer position to which I was reassigned was not an authorized personnel allowance billet. The position was created by the Command as a special assistant to the Executive Officer with no personnel assigned and no budget. As such, the position lacked regular opportunities to display leadership, management, and professional skills at the O-5 level. ...

Prior to my reassignment, I had no force protection or physical security experience. Much of my initial tenure as the Force Protection Officer was spent developing some personal expertise by attending Incident Command System training; working with the Port Security School, Maritime Law Enforcement School, meeting with the Training Center security contractor, working with the command's Armed Response Team, and through outreach to other Coast Guard and Department of Defense units in the local area. The contacts were initiated by me to better carry out my newly assigned duties. In my capacity as the Force Protection Officer, I organized several ad hoc working groups made up of diversified cross sections of Training Center personnel to review existing Training Center instructions and to develop new instructions to implement Coast Guard force protection requirements in the wake of the attacks of September 11, 2001.

When I was assigned as the Force Protection Officer, it was expected that I would be in the position until my projected rotation date in June of 2004. During this time, I was tasked to review and update the Training Center's security plans, including the Physical Security Plan, Emergency Operations Plan, Emergency Communications Plan, and the Intrusion Detection Plan. I was also tasked to conduct a study of all military watch standing positions, develop security performance watch standards for each watch station, and create an integrated Watch, Quarter, and Station Bill for the Command. Although it was expected that I would have just over one year to complete these tasks, I received orders to the Department of Homeland Security in January 2004 and detached from the Training Center on February 29, 2004. Despite departing nearly four months earlier than anticipated, I successfully completed all of the assigned tasks. In addition to these assigned tasks, I led an effort to develop security training for the Armed Response Team, developed a Civilian Position Description (PD) for a full time Force Protection Officer (the PD was approved and a person was hired after I departed), and coordinated with the local sheriff's department to provide additional patrols outside the entrance to the Training Center. These initiatives were completed as a result of the development of the ad hoc working groups that I organized and implemented.

While the OER for this period, April 1 2003, to February 29, 2004, acknowledges many of these accomplishments, it also reflects the decreased leadership and management responsibilities resulting from my being in appropriately reassigned from my primary duties as School Chief. As such, I feel that this OER is a direct result of the inaccuracies contained in the previous OER and is prejudicial to my opportunity for selection to O-6.

The applicant stated that in selecting commanders for promotion captain, selection boards weigh heavily an officer's past performance in leadership, management, and professional skills as a commander in O-5 billets. He stated that his failure to be selected for promotion to captain in 2007 and 2008 was caused by the 2004 OER's documentation of the lesser duties he was unfairly assigned to perform as the Training Center Force Protection Officer (FPO) from May 2003 through February 2004.

In support of his allegations, the applicant submitted another statement from the CO of the Training Center, dated February 29, 2008:<sup>3</sup>

During the period 01 April 2002 through 22 June 2003, I was the Commanding Officer of Coast Guard Training Center Yorktown. During a portion of this period, [the applicant] served as the Chief of the [xxxxx School]. In May 2003 [he] was reassigned as the Force Protection Officer.

As a result of the information provided to me in the OER for the period 01 April 2002 through 31 March 2003, I relieved [the applicant] of his duties as the Chief of the [xxxxx School] and placed him into a position of lesser responsibility and opportunity for leadership. The Force Protection Officer position was created as a stand alone position with no assigned personnel or funding. As such, [he] was removed from any personnel or fiduciary responsibilities, duties normally entrusted to officers of his rank.

As I previously commented in my statement of 14 October 2005, I do not believe that the information given to me by [the applicant's] supervisor in the OER for the period 01 April 2002 through 31 March 2003 provided a factual portrayal of [his] performance during the period ... Had I received a proper evaluation from the supervisor for this evaluation period, I would not have removed [the applicant] from his assignment as School Chief.

[The applicant's] assignment as the Force Protection Officer had a significant and a diminishing impact on his opportunities for leadership and management at the Training Center. I believe it is a tribute to his self determination and loyalty to the Coast Guard that he zealously engaged these new duties without any negativity. In reviewing [his] OER for the period ending 29 February 2004 (after I had left Training Center Yorktown), I was highly impressed with his accomplishments as Force Protection Officer as noted in this evaluation. However, without the appropriate leadership opportunities available in previous position [sic], I do not believe it can accurately portray [his] leadership, management, and professional potential. Had [the applicant] remained in his position as School Chief, I believe he would have successfully demonstrated the leadership, management, and professional capabilities required to serve as a Coast Guard Captain.

I was pleased to receive word that the [BCMR] had expunged [the applicant's] OER for the period 01 April 2002 through 31 March 2003. As my decision to relieve [him] of his duties was based on the inaccuracies of that OER, I believe his assignment as the Force Protection Officer unfairly prejudiced his opportunity for selection to higher ranks. I highly recommend that [his OER] for the period 01 April 2003 through 29 February 2004 be likewise expunged from his record.

The applicant also submitted two bulletins issued by the Coast Guard Personnel Command (CGPC) concerning the unofficial reassignment of officers within their commands. In ALCGOFF 017/06, which was issued on March 9, 2006, and concerned "Reassigning Officer within Units and Aligning Officer Evaluation Reports with Primary Duties," CGPC stated that a review of OERs and officer "assignment shopping list errors" had revealed that many officers were not working in the position to which they had been assigned by CGPC. CGPC stated that new procedures were needed to improve the alignment between officers' actual duties and their duties in the Direct Access database because CGPC uses the database to manage the officer corps and make new assignments. CGPC noted that it is the official order issuing authority under Articles 4.A.2. and 4.A.3. of the Personnel Manual, but that "[u]nit commanders, particularly at large units and sectors, often move officers within their unit to optimize operational readiness, match skill-sets to positions, and provide valuable cross-training opportunities to junior officers." CGPC also noted that "[b]oards and panels often have difficulty assessing an officer's experience

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<sup>3</sup> Because this CO left the Training Center on June 22, 2003, he was not a member of the rating chain that prepared the OER at issue in this case, which was prepared in March 2004.

and performance relative to their peers when the description of duties is inconsistent with the assignment or other service norms.” Therefore, CGPC announced a new procedure by which commanding officers could request CGPC’s approval of intra-unit reassignments. CGPC suggested that these requests be made “immediately prior to the assignment season” so that CGPC would not assign an officer to a duty billet that was already being filled by a reassigned officer at the command. CGPC noted that it would approve “the vast majority of proposals” for reassignments and discuss any concerns about a reassignment with the command. CGPC further noted that under Article 10.A.4.c.2.b. of the Personnel Manual, an officer’s primary duty title should be shown in block 2 of an OER, and that the primary duty title shown in block 2 should be consistent with the Direct Access database.

On March 25, 2008, CGPC issued ALCGOFF 037/08, concerning “Reassigning Officers within Units and Aligning Officer Evaluation Reports with Primary Duties,” which superseded ALCGOFF 017/06 and stated that another review of OERs and “assignment shopping list errors” revealed that many officers were still not working in the positions originally assigned to them by CGPC. CGPC noted that it makes assignments “based on a balance of Service, unit, and officer needs with a focus on career development” and that “[o]fficers also have a reasonable expectation that they will perform the duties of the billet into which they are assigned.” CGPC further noted that when a command reassigned an officer to different duties without updating Direct Access, the Assignment Officer would not be able to accurately assess the unit’s needs and could not create an accurate “shopping list” of available officer billets. However, CGPC noted that reassignments are sometimes necessary “to optimize operational readiness, match skill-sets to positions, or provide valuable cross-training opportunities.” Therefore, CGPC revised the procedures by instructing commands to inform the Assignment Officer of any proposed reassignment of at least six months’ duration. CGPC noted that “[o]fficers performing primary duties other than those assigned by CGPC-opm also puts the Service at risk for unnecessary OER challenges or appeals (e.g., Board for Correction of Military Records, Personnel Records Review Board). Therefore, CGPC-opm will return OERs that do not properly identify primary duties.”

In addition, the applicant submitted a copy of the “Commandant’s Guidance to PY08 Officer Selection Boards and Panels.” The guidance emphasizes the need for officers who “continually reinforce core values”; “carry out the Commandant’s Strategic Intent” with “technical expertise, management, and leadership skills”; “think innovatively and act with conviction” when confronted with a crisis; are “capable of operating in a dynamic environment” as first responders to hazards and threats; “embrace partnerships and unity of effort” with federal, state, and local agencies; are “culturally attuned to the world in which we operate”; and “teach and mentor their people.” The guidance also advises selection boards to ensure that they understand the full scope of an officer’s assignments by carefully reviewing the “Description of Duties” block (block 2) in the officer’s OERs and to “pay close attention to the overall scope of authority and responsibilities for all positions, command and non-command, operations and support.” However, the guidance notes, selection boards should remember that “while officers have input to their assignment process, ultimately, they are issued orders based on the needs of the Service. Boards and panels should not base decisions on speculation as to why an officer was assigned to a certain billet or duty status. ... Boards and panels should not unduly emphasize operational or command assignments over key staff experiences.” For candidates for promotion to commander and captain, the guidance notes the following:

By the time officers compete for promotion to these ranks, they are generally top performers in specialty. In addition to performing technical or specialized aspects of their assignments well, officers in the O-5 and O-6 grades must demonstrate that they possess the leadership, management, and professional skills necessary to obtain optimal performance from people. To meet current and emerging Service demands, the Coast Guard is requiring more officers to remain within their respective specialty areas. As officers move into senior ranks, they must have an understanding of the major issues facing the Coast Guard as a whole in order to best contribute, through their particular expertise, to the overall needs of the Service. This understanding of macro Service issues can be acquired in many ways even within specialty, through assignment diversity (different type of unit/different type of billet/different geographic location), participation in studies and task forces, and special assignments which provide a more comprehensive understanding of issues important to our Service.

Because of the dramatically increased scope of authority and responsibility for O-5 and O-6 positions, officers you select to serve in these grades must be able to make the leap from hands-on management of the day-to-day details to empowering their people to perform those functions, while they take a strategic view, including a broad understanding of the joint, interagency and even inter-governmental arenas. They must have the ability to maintain our multi-mission effectiveness and functionality with the capability to make risk-based decisions under stressful circumstances. They must demonstrate the public acumen and capability to work cohesively with out joint inter-agency partners to optimize mission execution. They must understand how Coast Guard budgets and business systems impact operational outputs. The qualities that we look for in Flag officers should be apparent in our best-qualified O-6's.

## **SUMMARY OF THE RECORD**

On December 20, 1985, the applicant was appointed an ensign in the Coast Guard Reserve. On August 26, 1986, he was integrated into the regular, active duty Coast Guard. He was promoted to lieutenant junior grade on June 19, 1987; to lieutenant on July 1, 1990; to lieutenant commander on August 1, 1996; and to commander on September 1, 2001.

The applicant reported to the Training Center to serve as the xxxxx School Chief on July 24, 2000, while still a lieutenant commander. In his first annual OER in this position, which has an end date of April 30, 2001, he received nine marks of 5 and nine marks of 6 in the various performance categories and a mark in the fifth spot on the comparison scale, denoting an "excellent performer; give toughest, most challenging leadership assignments." His reporting officer noted that the applicant was highly qualified and highly recommended for command afloat or post-graduate study and that he had recently been selected for, and was well deserving of, promotion to commander.

On the applicant's second annual OER as the xxxxx School Chief, which was his first evaluation as a commander and has an end date of March 31, 2002, the applicant received significantly lower marks: nine marks of 4, eight marks of 5, and one mark of 6 in the various performance categories and a mark in the middle, or fourth, spot on the comparison scale, denoting a "good performer; give tough, challenging assignments." The comments in this OER are also not as laudatory as those in his OER for the prior year. His reporting officer wrote that the applicant was a "sincere, conscientious officer" whose "vast shipboard experience and professional skills make him a candidate for any CO (WMEC) or XO (WAGB, WHEC) position." Instead of recommending the applicant for promotion to captain, the reporting officer noted that the applicant had been promoted to commander during the evaluation period.

The applicant's third annual OER as the xxxxx School Chief, with an end date of March 31, 2003, is the 2003 OER that was removed from his record pursuant to the Board's order in BCMR Docket No. 2006-085. In lieu of the substantive OER, an OER prepared "for continuity purposes only" was entered in his record with no numerical performance marks or comments. Block 2 of this continuity OER states only the following: "SCHOOL CHIEF, xxxxxxxx XXXXXXXXX SCHOOL: OER submitted for continuity purposes only in accordance with Article 10.A.3.a.5.c. of the Coast Guard Personnel Manual."<sup>4</sup>

The fourth OER that the applicant received while assigned to the Training Center is the disputed 2004 OER in this case. It documents his continuing service as the xxxxx School Chief in April and May 2003 and his service as the FPO from June 2003 through February 2004. The marks and comments in this OER, which are mediocre for an O-5, appear in the table below. The "Description of Duties" in block 2 of the OER states the following:

FORCE PROTECTION OFFICER (FPO) (9 months): Leads TRACEN anti-terrorism & force protection program; protects an average daily population of over 1500 people, a \$104 million dollar shore plant, a large armory & full service waterfront. Coordinates unit contingency planning efforts for hurricanes & other natural disasters. Leads several diverse teams such as the unit Physical Security Working Group. Represent TRACEN at regional security coordination meetings.  
 CHIEF, xxxxxxxx XXXXXXXXX (xxxxx) SCHOOL (2 months): Delivers comprehensive XXXX training, manages \$235K annual budget, publishes quarterly XXXX Bulletin.  
 ATTACHMENTS: CG Achievement Medal Dated 20 February 2004

#### MARKS AND COMMENTS IN APPLICANT'S 2004 OER

| #  | CATEGORY                  | MARK | WRITTEN COMMENTS   |
|----|---------------------------|------|--|
| 3a | Planning and Preparedness | 5    | Submitted detailed overhaul of unit's entire library of required security plans including: The Physical Security Plan, Emergency Operations Plan, Emergency Communications Plan & the Intrusion Detection Plan. Organized & supervised a large cross-divisional team to improve unit compliance with published security standards & ability to implement COMDT mandated Force Protection Conditions. Group completed an exhaustive study of all military watchstanding positions, developed specific security performance standards for each watch station & integrated each watch into a unit Watch, Quarter & Station Bill; combined several stovepiped watches into a flexible response organization & developed a training program that may be offered as a resident course for other Coast Guard units. Completed new XXXX xxx Supervisor Curriculum, improving the accounting process for calculation of instructor contact hours. Updated other XXXX courses to make them more relevant & efficient; for example, Senior Officer XXXX course shortened by 20%. Quickly adapted to new duties as FPO & the difficult challenge of implementing recommendations from an outside security study in a highly resource constrained environment. Outreach to local sheriff's department led to a cost-effective increase in unit security while reducing watchstanding requirements on unit personnel and increasing goodwill with the local community. |
| 3b | Using Resources           | 5    |  |
| 3c | Results/ Effectiveness    | 5    |  |
| 3d | Adaptability              | 5    |  |
| 3e | Professional Competence   | 5    |  |

<sup>4</sup> Article 10.A.3.a.5.c. of the Personnel Manual states that "[a]n OER for continuity purposes may be required by Commander (CGPC-opm) or Commander (CGPC-rpm) to implement judicial and administrative adjudications, and when directed by Commander (CGPC)." Article 10.A.3.a.5.d. states that "[w]hen submitting a continuity OER, the ... designated Supervisor shall briefly describe the Reported-on Officer's responsibilities in Section 2 and state the reason the OER is submitted for continuity purposes, e.g., Submitted IAW Article 10.A.3.a.5., member separating on 01 July 2000. All other evaluation areas, including section 9, shall be left blank with "NOT OBSERVED" marked for each dimension."

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|----|--|----|---|
| 4a | Speaking and Listening   | 5  | Confident & articulate speaker. Regular briefs to CO/XO on force protection & watchstanding matters; clearly presented objectives to the Physical Security Working Group; presented final group recommendations in formal presentation. Lead author on revisions to a host of security plans & unit Instructions. Wrote clear article to help members prepare for Hurricane Isabel, which devastated parts of the local area & article on how to obtain assistance from the Federal Emergency Management Agency (FEMA) after storm passed.  |
| 4b | Writing  | 5  |   |
| 5a | Looking Out for Others   | 4  | Voluntarily remained onboard during Hurricane Isabel to assist various watchstanders & to capture lessons learned for further improvements to the TRACEN's plans. Active leader of the Yorktown Officer Association; arranged the CGPC (opm) "road show" for all junior officers, organized several events such as a visit from the head of the CG's intelligence program & coordinated officer participation in supporting the unit's Bluegrass Festival. Successfully led the Physical Security Working Group to reach consensus on many difficult issues. Pro-active steps to increase cooperation and information sharing with several local Department of Defense facilities and the York County Sheriff's Department. All efforts had a positive impact. Represented command as guest speaker at Boy Scout Eagle Award banquet, advancing a key component of the unit's balanced score card. While at xxxxx school, continued successful team effort to update curriculums, lesson plans, and practical exercises. Worked with other branches to change process for curriculum reviews. Worked well with other senior staff as a member of the TRACEN awards board. Independent duty as FPO doesn't permit [the applicant] to formally supervise any personnel; however, closely monitored & accurately reported performance of contracted security guards. |
| 5b | Developing Others  | 4  |   |
| 5c | Directing Others   | 5  |   |
| 5d | Teamwork   | 4  |   |
| 5e | Workplace Climate  | 4  |   |
| 5f | Evaluations  | 4  |   |
| 6  | Signature of the XO of the Training Center, serving as the Supervisor, dated March 12, 2004                |    |   |
| 7  | Reporting Officer's Comments   | NA | Reporting Officer is also Supervisor.   |
| 8a | Initiative   | 4  | Volunteered for a second year as a site manager for the Coast Guard's "missions day" program which exposes Congressional & Department of Homeland Security staffs to the Coast Guard; ensured that the important, multi-mission site at the waterfront ran like clockwork to impress these important visitors. Sound judgment in leading various security & planning initiatives. Highly active member of the community generating goodwill for the CG. Dedicated member of local Boy Scout troop leadership; completed advanced scout leadership program to serve on scout district training team. Volunteer football coach at local middle school. Raised cancer research funds as part of "Circle of Life" relay team. Quickly developed working knowledge of security standards & methods, the Incident Command System & engineering planning factors to present a credible Coast Guard presence in various inter-service security planning & coordination groups attended largely by full-time DOD security experts with years of related experience. Completed 18 credits (50%) of a Masters of Public Administration Degree with a 4.0 GPA. Works out regularly; completed 13 <sup>th</sup> marathon.  |
| 8b | Judgment   | 5  |   |
| 8c | Responsibility   | 5  |   |
| 8d | Professional Presence  | 5  |   |
| 8e | Health & Well-Being  | 5  |   |
| 9  | Comparison Scale   | 4  | [A mark of in the fourth spot means that in comparison with other commanders, the Reporting Officer rated the applicant as a "[g]ood performer; give tough, challenging assignments."]  |
| 10 | Potential  | NA | Transferring, off season, to a "purple" job with the Department of HLS where [his] broad experience will be an asset. A serious mariner with prior command afloat who strongly desires additional sea duty and has pursued a Merchant Mariner's License to maintain proficiency. Recommended for XO afloat duty; willing to accept short-notice orders, including overseas assignment, to obtain additional operational tour. Obtained useful "joint" experience with DOD units in FPO role. Also well suited for positions within the XXXX program such as a District or Headquarters XXXX staff. Recommended for promotion with peers.  |
| 11 | Signature of the XO of the Training Center, who also served as the Reporting Officer, dated March 12, 2004 |    |   |
| 12 | Signature of the Reviewer, who was the CO of the Training Center, dated March 12, 2004                     |    |   |

On March 1, 2004, the applicant was detailed to the Department's xxxxxxxxxxxx Staff as an xxxxxxxxxxxxxxxx. In this position, he used his operational expertise to facilitate the integration and coordination of field-level operations throughout the Department; to develop a Department-wide doctrine and policy for operations; and to test and evaluate the concept of regional operations centers. As a member of the Department's xxxxxxxxxxxxxxxx Team, he helped to develop and implement an initial national operations plan to counter elevated terrorist threats and to develop and coordinate implementation of national strategic initiatives, including the National Response Plan and the National Incident Management System.

On his first OER as an xxxxxxxxxxxxxx for the Department, which covers the period March 1, 2004, to March 31, 2005, the applicant received nine marks of 5, seven marks of 6, and two marks of 7 in the various performance categories and a mark in the fifth spot on the comparison scale. His Reporting Officer, a rear admiral serving as the Deputy Director of Department's Operational Integration Staff, noted that the applicant had "made significant contributions to the development of DHS policies" and recommended him for promotion "with peers." On his second OER in this position, which covers his service from April 1, 2005, to October 18, 2005, the applicant received six marks of 5, ten marks of 6, and two marks of 7 in the performance categories and a mark in the fifth spot on the comparison scale. His Reporting Officer wrote that he "continues to make significant contributions to the development of DHS policies" and highly recommended him for promotion to captain. On the applicant's third OER in this position, which covers his service from October 19, 2005, to March 31, 2006, the applicant received four marks of 5, twelve marks of 6, and two marks of 7 in the performance categories and a mark in the fifth spot on the comparison scale. The Reporting Officer and Reviewer wrote that the applicant displayed exceptional operational knowledge and had their highest recommendation for promotion to O-6" as well as for command afloat or ashore. The OER notes that the applicant received a Coast Guard Commendation Medal for this work on March 1, 2006. From April 1 to July 31, 2006, the applicant served as the Chief xxxxxxxxxxxxxxxxxxxxxx in the DHS xxxxxxxx. On his OER for this work, he received ten marks of 6 and eight marks of 7 in the performance categories and a mark in the sixth spot on the comparison scale, which indicates that he was "strongly recommended for accelerated promotion" by his Reporting Officer. Because his Reporting Officer was a civilian, the Reviewer added a comment page and assigned him a mark in the fifth spot on the comparison scale. The OER notes that the applicant received another Commendation Medal on May 26, 2006.

The applicant failed of selection for promotion to captain in 2006, but this failure was removed from his record pursuant to the Technical Amendment in BCMR Docket No. 2006-085 because the 2003 OER disputed in that case was still in his record when the selection board met in 2006.

In August 2006, the applicant began serving as xx. On an OER covering his service from August 1, 2006, to March 31, 2007, the applicant received thirteen marks of 6 and 5 marks of 7 in the performance categories. Under a new comparison system, the applicant was marked as among the top 10% of all commanders and "one of the few distinguished performers" on the comparison scale, and on the promotion scale he received a mark of "definitely promote."

On June 8, 2007, the Commandant issued ALCGOFF 059/07 announcing the upcoming captain selection board in July 2007 for PY 2008 and stating that the captain selection board would be allowed to select 61 of 92 eligible commanders for promotion to captain, providing an opportunity of selection of 66%. Paragraph 16 of this bulletin advises all candidates for promotion to review their military records prior to the date of the selection board.<sup>5</sup> On June 14, 2007, the Commandant issued ALCGOFF 067/07 announcing the names of the commanders, including the applicant, who would be considered for selection for promotion in July 2007. This bulletin also advised all candidates for promotion to review their military records. The applicant failed of selection for promotion to captain in 2007. Although the 2003 OER disputed in Docket No. 2006-085 had been removed from his record and replaced with the continuity OER pursuant to the Board's order, the 2004 OER disputed in this case was in his record.

On his OER as xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx from April 1, 2007, to March 31, 2008, the applicant received nine marks of 6 and nine marks of 7 in the performance categories, and he was again assigned a mark in the top 10% as "one of the few distinguished performers" and a mark of "definitely promote." On July 11, 2008, the new commanding officer of the Training Center awarded the applicant a Commendation Medal for his work as the xxxxx School Chief from August 2000 to May 2003.

The applicant failed of selection for promotion again in July 2008. The opportunity of selection by this board was 66% in that the captain selection board was allowed to select 89 of the 134 eligible candidates for promotion to captain.

### **VIEWS OF THE COAST GUARD**

On September 16, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case by replacing the disputed OER with one prepared "for continuity purposes only" and by removing the applicant's failures of selection in 2007 and 2008 from his record.

The JAG stated that the applicant "has provided sufficient evidence to carry the established burdens under law. [The CO's] decision to relieve the applicant of his duties as the Chief of the [xxxxxx School], placing him into a position of lesser responsibility and opportunity for leadership stemmed from information provided in an inaccurate OER." The JAG noted that the disputed OER in this case reflects the applicant's performance in an unauthorized reassignment with less responsibility and opportunity for leadership. The JAG stated that the reassignment constituted "legal error."

The JAG further argued that the applicant's record "was not prejudiced by the reassignment error per se" but "the subsequent OER that stemmed from that erroneous reassignment has a 'worsening' effect on his record and could have contributed substantially to his non-selections." The JAG noted that the disputed OER does not contain any negative marks or present an injustice in his record, but "it does present a negative deviation from Applicant's OERs both before and after the OER at issue. Applicant's OER history displays a continuous pattern of distin-

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<sup>5</sup> This advice has long been standard in all ALCGOFFs announcing selection boards and eligible candidates for promotion.

guished and excellent performance.” The JAG stated that although the disputed OER does not contain negative information, it also “does not address the Applicant’s demonstration of leadership, management, and professional skills, which *must* be demonstrated at the O-5 and O-6 levels in accordance with the Commandant’s Guidance.”

The JAG stated that “[b]eing erroneously placed into a position of lesser responsibility and opportunity for leadership at the O-5 level and then subsequently receiving an OER that does not reflect the leadership and responsibility performance levels makes the Applicant’s record appear worse than it would in the absence of such error.” The JAG concluded that the mediocrity and lack of leadership potential in the disputed OER “is clearly evident and when viewed in comparison to Applicant’s OER history—is detrimental and could have been the cause of his non-selections in PY09.” The JAG concluded that “there appears to be a causal nexus between the reassignment error, the OER in question, and the failure to promote.”

The JAG attached to his recommendation some information on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC noted that Article 4.A.1.b.a. of the Personnel Manual states that CGPC “fills authorized allowances by providing personnel capable of performing all necessary tasks so the Coast Guard can properly carry out its mission. To accomplish this task the CGPC exercises directing, guiding, and restraining authority over enlisted and officer assignments.” In addition, under Article 4.A.3.b.1., CGPC issues permanent change of station (PCS) orders.”

CGPC stated that in the summer of 2000, while still a lieutenant commander, the applicant was issued PCS orders to report to the Training Center to serve as the xxxxx School Chief, which was a lieutenant commander billet. His job code in CGPC’s database never changed during his four-year tour at the Training Center from the summer of 2000 until his transfer in March 2004. CGPC submitted the following statements signed by the CO and XO of the Training Center in 2004, who prepared the disputed 2004 OER.

***Statement of the XO (Supervisor and Reporting Officer for the 2004 OER)***

The XO stated that although present at the Training Center in 2002 and 2003, he has no direct knowledge or the difficulties between the applicant and his prior supervisor that resulted in the 2003 OER, which was previously removed by the Board. He stated that as the xxxxx School Chief, the applicant reported to a more senior CDR, who was his supervisor and who in turn reported to another CDR—the Training Officer—who in turn reported to him as the XO. As the FPO, the applicant report directly to the XO, who is a captain. The XO stated that when the difficulties between the applicant and his prior supervisor “came to a head,” he

4. ... was looking for a CDR with operational experience for an important full-time project involving physical security and force protection. While it had been over 18 months since 9/11, the TRACEN’s security and force protection had not really changed much. We had taken a few modest steps, mostly as a visual deterrent, but our efforts were fractured, incomplete, and not effective against the predicted threats. This was unacceptable given a daily population of over 1500 people, a large armory, and the importance of the TRACEN’s overall mission.

5. It was critical to have a CDR (O-5) working on this project full time. Prior efforts using part-time, and more junior, personnel had been ineffective. The project required working with many CDR School Chiefs & Department Heads at the TRACEN, the TRACEN CO & XO, some-

where in the range of a hundred military security watchstanders, civilian security guards, a range of military watch team leaders—including officers and senior enlisted personnel, in-house medical personnel, local fire departments & EMS, Coast Guard Headquarters security staff, security consultants, local law enforcement, and Force Protection Officers (FPO) from nearby military installations. (I think the FPOs from the neighboring Army and Navy bases were O-5s.)

6. [The applicant] was serving in a position at the [xxxxx School] designated for a more junior officer (LCDR/O-4). In this sense, he was an “extra” CDR resource. He had a wealth of operational experience and a highly regarded assistant at the school. [He], therefore, had been discussed as a potential candidate for this project several months beforehand. In early April 2003, he was, obviously assigned to this project by the Commanding Officer. Again, I had no formal role in the prior OER and cannot fully address how that OER influenced the decision to assign [him] to this project.

7. Accordingly, [the applicant’s] OER rating chain was amended to have me, the Executive Officer, as his Supervisor & Reporting Officer for the duration of the project. I supervised him throughout the period and provided any necessary funding and support. he was treated like the other senior Division Chiefs, meeting regularly with the TRACEN Commanding Officer to discuss force protection issues.

The XO further stated that the 2004 OER, “including the attached award, accurately describes [the applicant’s] duties and how he performed them. He had a very large and difficult job during a time when the CG’s security doctrine and procedures were incomplete, at best. There was no well-worn path, in other words, for [the applicant] to simply follow. He had to lead and coordinate several diverse groups, build consensus, and develop and then implement effective doctrine and procedures.”

***Statement of the CO (Reviewer for the 2004 OER)***

The CO stated that he worked closely with the applicant in his work as the Force Protection Officer. The CO stated that since he was not present when the applicant was reassigned to this position, he cannot address why it happened. However, he and the XO did not consider the reassignment to be a “temporary landing place” but rather a “critical responsibility that was appropriately placed in the trust of a Commander.” The CO stated that “[h]ad [the applicant] not been assigned to this position through other circumstances, it is likely that another O-5 [commander] would have been ‘detailed’ to assume these responsibilities. There were many complex relationships to manage, and while the work was somewhat ambiguous, clear roles and responsibilities were articulated by [the XO].”

The CO further stated that the 2004 OER “accurately reflects the performance of [the applicant]. He had many opportunities to excel, and leadership and initiative can be exercised (or not) whether (or not) you have direct reports and a finite budget. In fact as is articulated in Block 2 of the OER, [the applicant] led several teams, even though they were not direct reports, and in the absence of a finite budget, had access to the range of funds available to the XO and those he could have garnered from other programs/partners.”

The CO alleged that the applicant “performed his duties in an average manner as is reflected in this OER. He was given many opportunities to excel and in this position with direct access to the top leadership of a major training command he could have created security regimes and doctrine that would have served as examples for other commands. Many Commanders fill

administrative billets with no supervisory or budgetary responsibilities. They compensate by creating opportunities and supporting through exceptional effort and enthusiasm the interests of their superiors. I believe his performance was evaluated fairly and accurately.”

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On October 17, 2008, the applicant responded to the Coast Guard’s recommendation. The applicant stated that his reassignment as Force Protection Officer was unlawful and unjust because COs may not make internal officer personnel transfers contrary to CGPC’s orders and because the reassignment was the “direct fallout” of the erroneous OER, which the Board has already removed from his record. The applicant argued that the unlawful intra-unit transfer harmed him because it “was not a career-enhancing position for an active duty regular officer of his grade.”

In addition, he argued, the 2004 OER documenting this “serious career sidetrack” prejudiced his record before the selection boards. The applicant noted that the JAG has agreed that his record is prejudiced by the 2004 OER and that it is not unlikely that he would have been selected for promotion had the OER not been in his record when it was reviewed by the captain selection boards in 2007 and 2008.

The applicant noted that on July 11, 2008, he was finally awarded a Commendation Medal for his work as the xxxxx School Chief, more than five years after he was removed from that position. He argued that the late delivery of this medal is another reason to remove his 2007 failure of selection from his record.

The applicant further stated that the removal of the 2004 OER will create a two-year gap in his performance record filled only with continuity OERs. Therefore, he asked the Board to consider recommending that he be directly promoted to captain. The applicant stated that the Air Force Board for Correction of Military Records has made promotion recommendations “where, as here, an officer has suffered career injury of a kind that cannot be remedied otherwise.” The applicant argued that direct promotion, instead of merely removing his failures of selection, is appropriate “because it is impossible to see how [he] will ever be able to overcome the ruinous effect on his career opportunities as a result of the events underlying this case and the cumulative impact of two successive continuity OERs in his current grade.”

### **FINDINGS AND CONCLUSIONS**

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. Although the application was not filed within three years of the applicant’s discovery of the

alleged error or injustice, it is considered timely under *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994).<sup>6</sup>

2. The applicant alleged that his 2004 OER should be removed from his record because it documents an unlawful intra-unit reassignment to duties that were not on a par, in terms of leadership and management opportunities, with his duties as the xxxxx School Chief. He asked the Board also to remove his failures of selection to captain in 2007 and 2008. However, on April 6, 2006, when the applicant submitted his application in BCMR Docket No. 2006-085 seeking removal of his 2003 OER, his 2004 OER had been in his record for more than two years, and yet he made no complaint whatsoever about it or about his reassignment to new duties in May 2003. Therefore, the Board concludes that in early 2006, the applicant reviewed his record and found only his 2003 OER to be erroneous or unjust. Moreover, after meeting in person with the applicant about his failures of selection, the chief of the Officer Career Management Branch wrote in an email dated August 14, 2007, that the applicant “believes the PY08 [calendar year 2007] board should count as his first look for O-6.” Therefore, the applicant was apparently satisfied in 2007 that his record, with his 2004 OER therein, was correct when it was reviewed by the captain selection board in 2007. If the applicant was actually unhappy with his reassignment and the 2004 OER all along, he must have made a strategic decision not to request removal of the 2004 so that he would not have two continuity OERs in his record.<sup>7</sup>

3. Now, however, in retrospect, after failing of selection again, the applicant alleges that his 2004 OER is also unjust and should be removed from the record along with his further failures of selection. The applicant is alleging errors in old records in piecemeal fashion so that he may have extra chances for promotion.

4. The applicant alleged that the 2004 OER is unfair because he was given an assignment with less responsibility, no direct subordinates, and no budget to manage. Article 10.A.1.b.1. of the Personnel Manual provides that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by a “misstatement of significant hard fact,” factors that “had no business being in the rating process,” or a “clear and prejudicial violation of a statute or regulation.”<sup>8</sup> The applicant has not challenged the accuracy of any of the marks or comments in the disputed OER, but alleges a prejudicial violation of a regulation and an unfair lack of leadership and management opportunities during the evaluation period because of his reassignment, which he alleged, made the entire OER unfair. The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that

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<sup>6</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

<sup>7</sup> A continuity OER is one that includes a description of the officer’s duties but does not contain any numerical marks or comments about his performance. Personnel Manual, Article 10.A.3.a.5.

<sup>8</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

it is erroneous or unjust.<sup>9</sup> Absent evidence to the contrary, the Board presumes that the OER was prepared “correctly, lawfully, and in good faith.”<sup>10</sup>

5. The applicant alleged that the 2004 OER is the result of a prejudicial violation of a regulation. He alleged that his reassignment to new duties by his CO was unlawful because only CGPC has the authority to issue permanent change of station (PCS) orders. In support of this allegation, he submitted ALCGOFFs issued in 2006 and 2008 providing procedures whereby COs who want to reassign officers within their units should request permission to do so. He also pointed out that Article 4.A.3.b.1. of the Personnel Manual states that “Commander (CGPC-opm-2) issues permanent change of station (PCS) orders,” which normally specify a particular billet at the station, and that COs may not issue PCS orders. The JAG concluded that the reassignment constituted “legal error” without citing any regulation that actually prohibits a CO from reassigning an officer to new projects as they arise. The fact that only CGPC issues PCS orders does not persuade the Board that intra-unit reassignments by COs are therefore unlawful or a violation of the Personnel Manual. As noted in the ALCGOFFs submitted by the applicant, intra-unit reassignments have long been quite common. Apparently only recently (and three years after the applicant’s own reassignment) has CGPC instituted procedures whereby commands should seek approval for such reassignments. Just as the States and federal agencies must deal with unfunded mandates, Coast Guard commands must often handle significant new duties without being assigned additional personnel. This was especially true in the aftermath of the terrorism of September 11, 2001, when force protection suddenly received much higher priority. COs apparently often reassign officers and enlisted members to optimize the performance of the command as missions and priorities change. The Board finds that the applicant’s intra-unit reassignment to new duties was not unlawful. Moreover, even assuming *arguendo* that it was “legal error,” as the JAG stated, the Board finds that an assignment to new duties would not *per se* render the OER documenting those new duties erroneous or unjust or warrant its removal. The Board notes that while the JAG argued that the reassignment was “legal error,” the JAG agreed that the reassignment was not *per se* prejudicial.

6. The applicant alleged that the disputed 2004 OER is unjust because it documents a reassignment to a position with less responsibility, no direct subordinates, and no budget, which he argued was prejudicial to his record. The CO who made the reassignment in May 2003 wrote on February 29, 2008, that he reassigned the applicant because of the erroneous 2003 OER and that the Force Protection Officer (FPO) position was “of lesser responsibility and opportunity for leadership. The Force Protection Officer position was created as a stand alone position with no assigned personnel or funding. As such, [he] was removed from any personnel or fiduciary responsibilities, duties normally entrusted to officers of his rank.” However, the XO, who recommended the applicant’s reassignment as FPO and who signed the disputed OER as both Supervisor and Reporting Officer, stated that as an O-5 serving in the xxxxx School Chief O-4 billet, the applicant was an “extra” O-5 resource and that the XO needed to fill the FPO position and was looking for an O-5 because “[p]rior efforts using part-time, and more junior, personnel had been ineffective. The project required working with many CDR School Chiefs & Department Heads at the TRACEN, the TRACEN CO & XO, somewhere in the range of a hundred

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<sup>9</sup> 33 C.F.R. § 52.24(b).

<sup>10</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

military security watchstanders, civilian security guards, a range of military watch team leaders—including officers and senior enlisted personnel, in-house medical personnel, local fire departments & EMS, Coast Guard Headquarters security staff, security consultants, local law enforcement, and Force Protection Officers (FPO) from nearby military installations. (I think the FPOs from the neighboring Army and Navy bases were O-5s.)” Moreover, the XO wrote that the applicant was chosen as the FPO because “[h]e had a wealth of operational experience and a highly regarded assistant at the school [to replace him as School Chief]. [He], therefore, had been discussed as a potential candidate for this project several months beforehand.”

7. In light of the CO’s and XO’s statements, it is clear that the applicant’s erroneous 2003 OER was a factor that was considered in his reassignment but certainly not the only factor. His O-5 rank, his operational experience, and the fact that his Assistant School Chief was qualified to act as the xxxxx School Chief in his stead clearly were also factors. In addition, while the FPO had no direct subordinates and no budget, it was apparently an O-5 level position appropriate to the applicant’s O-5 rank with significant responsibility, as shown in block 2 of the 2004 OER, whereas the xxxxx School Chief position is an O-4 billet.

8. The CO who reassigned the applicant before leaving the Training Center in June 2003 supported his allegation that the reassignment was unfair because the FPO had less responsibility and opportunity to demonstrate leadership and management skills than did a School Chief. The XO’s description of the work and the 2004 OER itself, however, indicate that the applicant had significant responsibilities and worked with other military services’ officers of the same O-5 rank. The subsequent CO, who was present throughout most of the evaluation period for the 2004 OER and who signed it as the Reviewer, stated that “[h]ad [the applicant] not been assigned to this position through other circumstances, it is likely that another O-5 [commander] would have been ‘detailed’ to assume these responsibilities. There were many complex relationships to manage, and while the work was somewhat ambiguous, clear roles and responsibilities were articulated by [the XO].” This CO stated that the 2004 OER “accurately reflects the performance of [the applicant]. He had many opportunities to excel, and leadership and initiative can be exercised (or not) whether (or not) you have direct reports and a finite budget. In fact as is articulated in Block 2 of the OER, [the applicant] led several teams, even though they were not direct reports, and in the absence of a finite budget, had access to the range of funds available to the XO and those he could have garnered from other programs/partners.” The CO also stated that the applicant “was given many opportunities to excel and in this position with direct access to the top leadership of a major training command he could have created security regimes and doctrine that would have served as examples for other commands. Many Commanders fill administrative billets with no supervisory or budgetary responsibilities. They compensate by creating opportunities and supporting through exceptional effort and enthusiasm the interests of their superiors.” Therefore, the Board is not persuaded that the FPO position was inappropriate for an O-5 or that the reassignment necessarily prevented the applicant from demonstrating leadership, management, and professional skills. Without direct subordinates and a designated budget, it may have taken more initiative for the applicant to demonstrate such skills than in the O-4 xxxxx School Chief billet, but the CO’s statement shows that he had opportunities to do so.

9. The JAG argued that the 2004 OER should be removed not because of any prejudice in the reassignment *per se* but because “the subsequent OER that stemmed from that erroneous reassignment has a ‘worsening’ effect on his record and could have contributed substantially

to his non-selections.” The JAG further argued that although the 2004 OER does not contain any negative marks or present an injustice in his record, “it does present a negative deviation from Applicant’s OERs both before and after the OER at issue. Applicant’s OER history displays a continuous pattern of distinguished and excellent performance.”<sup>11</sup> The JAG stated that the mediocrity and lack of leadership potential in the 2004 OER is clearly evident in comparison to the rest of the applicant’s OERs and that “[b]eing erroneously placed into a position of lesser responsibility and opportunity for leadership at the O-5 level and then subsequently receiving an OER that does not reflect the leadership and responsibility performance levels makes the Applicant’s record appear worse than it would in the absence of such error.” Thus, the JAG is arguing that the 2004 OER is unfair because (a) the reassignment was not validated by CGPC; (b) the marks and comments in the disputed OER are not excellent; and (c) the applicant has received some excellent marks and comments in other OERs during his career. In so arguing, the JAG contradicts long-standing precedent in Board decisions that the fact that one OER is worse than others in an officer’s record is not significant evidence that the poor OER is erroneous or unfair.<sup>12</sup>

10. The marks in the 2004 OER are mediocre for an O-5, but the Board is not persuaded that anything about the FPO duties *per se* prevented the applicant from earning higher marks. In their statements, the rating officials for the 2004 OER claimed that the applicant could have earned marks and comments that would have reflected well on his leadership, management, and professional skills, but that he did not earn exceptional marks. The JAG and the CO who made the reassignment insist that it was unfair and that the resulting 2004 OER should be removed. However, they do not expressly contradict the rating chain’s claim that it was an O-5 level position. It is not clear whether they believe the FPO assignment would have been unfair for any O-5, or whether they believe it was unfair for the applicant simply because the erroneous 2003 OER contributed to the decision to choose him for the assignment. Nevertheless, because the JAG has found, contrary to the statements of the rating officials, that the reassignment was unfair because it gave the applicant little opportunity to demonstrate leadership, the Board will concur in his recommendation that the 2004 OER be removed and replaced with an OER prepared for continuity purposes only.

11. The applicant asked the Board to remove his failures of selection in 2007 and 2008. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine if the applicant is entitled to the removal of his failures of selection because of the lack of the Commendation Medal in his record, the Board must answer the following two questions: “First, was the [applicant’s] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [he] would have been [selected for promotion] in any event?” The Board agrees with the JAG that the mediocre marks and comments in the applicant’s 2004 OER clearly make his record appear worse than it would without that OER. In addition, given the fine marks and comments in the applicant’s more recent OERs, it is not unlikely that he would have been selected for promotion if the 2004 OER had not been in his record when it was reviewed by the selection boards. Therefore, the applicant’s failure of selections should be removed. Moreover, because

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<sup>11</sup> The Board notes, however, that the applicant’s marks in his 2001 and 2002 OERs as the xxxxx School Chief show a downward trend in his performance.

<sup>12</sup> See e.g., BCOMR Docket No. 162-94 (“The fact that the applicant received higher marks in certain categories in other OERs ... does not prove that the mark he received on the disputed OER is inaccurate.”).

the applicant first failed of selection for promotion to captain in 2006 with the disputed OER in his record, if he is selected for promotion by the next captain selection board to review his record as corrected pursuant to this decision, his date of rank as a captain should be back dated to what it would have been had he been selected for promotion in 2006, and he should receive back pay and allowances.

12. The applicant asked the Board to recommend his direct promotion to captain because, he alleged, the effect of having two continuity OERs in his record is ruinous and cannot be overcome. In the Board's experience, however, officers can be selected for promotion with large gaps in their performance records.<sup>13</sup> Nothing in the record distinguishes this case from the many others in which failures of selection have been removed. The Board is not persuaded that a direct promotion recommendation is warranted and will not usurp the role of the Coast Guard's selection boards, which are tasked with the difficult job of selecting for promotion to captain only the best candidates from among many exceptional commanders.

13. The applicant asked the Board to take any action that might alleviate any negative perceptions that a selection board might draw from the two consecutive continuity OERs he will have in his record. Accordingly, the Board finds that the following paragraph should be included in block 3 of the new continuity OER:

“[The applicant's] Personnel Data Record includes two continuity Officer Evaluation Reports covering his active duty service from April 1, 2002, to February 29, 2004. His record has been corrected by the Secretary in accordance with 10 U.S.C. § 1552, and no adverse inference of any kind is to be drawn from the lack of more substantive Officer Evaluation Reports during this period.”

14. Accordingly, the applicant's record should be corrected by removing the 2004 OER; by replacing it with a continuity OER with the paragraph quoted in Finding 13 included in block 3; by removing his failures of selection for promotion in calendar years 2007 and 2008; and by back dating his date of rank and paying him corresponding back pay and allowances if he is selected for promotion by the next active duty captain selection board to review his record as corrected pursuant to this decision.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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<sup>13</sup> See, e.g., BCMR Docket Nos. 2003-116 and 2005-058, in which the applicant was selection for promotion to O-4 despite a recent six-year gap in his OERs.

**ORDER**

The application of CDR xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

His Officer Evaluation Report for the period April 1, 2003, through February 29, 2004, shall be removed from his record and replaced with one prepared "for continuity purposes only." Block 3 of this continuity OER shall contain the following paragraph:

CDR xxxxxxxxxxx's Personnel Data Record includes two continuity Officer Evaluation Reports covering his active duty service from April 1, 2002, to February 29, 2004. His record has been corrected by the Secretary in accordance with 10 U.S.C. § 1552, and no adverse inference of any kind is to be drawn from the lack of more substantive Officer Evaluation Reports during this period.

His failures of selection for promotion in 2007 and 2008 by the PY 2008 and PY 2009 captain selection boards, respectively, shall be removed from his record.

If he is selected for promotion by the next active duty captain selection board to review his record as corrected pursuant to this order, his date of rank shall be back dated to what it would have been had he been selected for promotion by the PY 2007 captain selection board, which convened in calendar year 2006, and he shall receive corresponding back pay and allowances.

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Lillian Cheng

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Paul B. Oman

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Darren S. Wall