

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-071

**XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX**

**DECISION OF THE DEPUTY GENERAL COUNSEL
AS THE OFFICIAL WITH DELEGATED AUTHORITY TO TAKE FINAL ACTION
ON BEHALF OF THE SECRETARY OF
THE U.S. DEPARTMENT OF HOMELAND SECURITY**

I approve the Recommended Final Decision of the Board for Correction of Military Records of the United States Coast Guard and the relief recommended in the order therein.

Date: _____

/s/ _____
Joseph B. Maher
Deputy General Counsel
U.S. Department of Homeland Security

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RECOMMENDED 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 upon receipt of the applicant's completed application on January 15, 2009, 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 September 9, 2010, is approved and 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 a special officer evaluation report (OER) covering his service from June 1, 2005, to March 10, 2006, and to replace it with one prepared for continuity purposes only (without numerical marks or comments). (Tab A) The disputed OER (Tabs B, C) purportedly documents his removal from his primary duty as an Assistant Operations Officer (AOO) of an Enhanced Maritime Safety and Security Team (EMSST).

The applicant alleged that the disputed OER is unfair because he was not serving in the position to which he had been assigned. The applicant stated that in 2004 he was assigned to be the Operations Officer (OO) of an MSST (not "enhanced"). However, when he reported to the unit, it was being merged with a Tactical Law Enforcement Team (TACLET) and reorganized as an EMSST. Because of the reorganization, instead of being the OO of an MSST, he was made the AOO of the EMSST and an Assistant Team Leader. The applicant stated that the other Assistant Team Leaders were current or prior TACLET or MSST team leaders with at least two years of experience. The applicant alleged that his prior assignments had prepared him for the managerial role of an OO, but did not give him the skills or qualifications necessary to be a tactical team leader. Therefore, he was "disadvantaged by not being allowed to work in the capacity [to which he] was assigned."

Moreover, the applicant alleged, he was "never given an opportunity to learn [the necessary skills] through a progression." Although he attended boarding officer school, he "was not

given an opportunity to learn and practice these skills.” He was also sent to a tactical training course, but “with little experience, [he] didn’t demonstrate sufficient proficiency to complete the course.” He was removed from the course and was not allowed to undergo the training a second time even though it was a prerequisite course for team leaders.

After his removal from the course, the applicant was “assigned as the Logistics Officer, a position which didn’t exist prior to non-completion of the training course.” In this position, he “faced formidable challenges, to include managing property accounts for two units which had no accountability of a majority of its equipment.” The applicant alleged that when he attempted to rectify the property discrepancies, he met “harsh resistance from [his] supervisor.” His supervisor, the Executive Officer (XO) of the EMSST, told him “on many occasions that [he] did not have the ‘tactical’ field operations skill sets expected of [his] pay-grade (i.e., qualified boarding officer), that [he] did not have the capabilities the unit required, and that [he] should not have been assigned to the unit.” In addition, he was told that the XO had already communicated that opinion to the Officer Personnel Management (OPM) branch of the Personnel Command before his assignment orders were even finalized. He alleged that “the negative attitude and condescending comments from [his] supervisor hampered [his] ability to perform.”

The applicant alleged that in January 2007, while assigned to a Sector Enforcement Division, he successfully qualified as a boarding team member and boarding officer. Thus, he proved that “under proper leadership [he] could perform to a high level.” The applicant argued that the disputed OER should be removed because if he had served in the OO position to which he was actually assigned in 2004, he would not have received the derogatory special OER. In support of his allegations, the applicant submitted a copy of the disputed OER, his OER Reply, and an assignment page in his electronic record, which shows that he was ordered to report to the MSST on July 1, 2004, to serve as the Operations Officer (OO) (Tab D).

SUMMARY OF THE RECORD

On August 6, 1999, the applicant, a prior enlisted Reserve port security specialist, was appointed an ensign in the Coast Guard Reserve. He was promoted to lieutenant junior grade on February 6, 2001, and began serving on extended active duty on August 1, 2002. On June 1, 2003, he was integrated into the regular Coast Guard as a lieutenant junior grade. On August 6, 2003, he was promoted to lieutenant.

Before his assignment to the EMSST, the applicant had received excellent OERs¹ (Tab E) serving as a marine investigator investigating marine casualties at the port of Los Angeles and Long Beach; an assistant intelligence officer at a Harbor Defense Command “providing expeditionary harbor defense and force security for CONUS & OCONUS deployable operations”; a force protection officer at a Harbor Defense Command, managing a security program for a joint expeditionary unit of 51 members in multiple locations and situations; a staff officer in the Port

¹ 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.”

Security Directorate at Coast Guard Headquarters; a staff officer in the Maritime Homeland Security Operations and Tactics Directorate; and a staff officer in the Office of Port Security Policy and Planning. The record also shows that by August 2004, the applicant had attained the following education, training, and qualifications (Tab F):

1989	A.A. in Administration of Justice	2001	Force Protection Officer
1991	Port Securityman School	2001	Anti-Terrorism Officer
1991	Communications Watchstander	2001	Expeditionary Warfare Intelligence Course
1991	Police certified SCUBA diver	2001	Reserve Officer Association Leadership Seminar
1992	Boarding team member	2002	Industrial Security Leadership and Development
1992	41/44-foot boat crew	2002	Weapons Officer
1993	B.S. in Justice and Security Management	2003	U.S.M.C. Rear Area Security & Combat Skills Course
1994	U.S.A.F. Security Police Officer Course	2003	U.S.N. SCUBA diver
1995	Investigating Officer	2003	Microsoft Basic Project
1997	Industrial Security Management	2003	U.S.C.G. certified in vertical insertion
1999	Master of Public Administration	2004	U.S.C.G. Basic Boarding Officer
2000	First Aid and CPR	2004	U.S.C.G. Team Coordination Training/Group Ops
2000	Global Command Control Systems		

The Applicant’s First OER at the EMSST (Tab G)

On August 10, 2004, the applicant reported for duty at the EMSST. His first OER from this command (Tab G) covers his service there through May 31, 2005, and states that he was the AOO of the EMSST, supervising four junior officers, four chief petty officers, and 45 petty officers and responsible for six small boats and trailers, two canine teams and their equipment, a dive team and their equipment, and chemical, biological, radiological, nuclear and explosive detection equipment. In addition, as a collateral duty, he was the Weapons Officer and as such managed the largest operational unit armory in the Coast Guard. This first OER from the EMSST was signed by the OO of the EMSST as the supervisor, the XO of the EMSST as the reporting officer (although he entered his title as CO), and the Chief of the Headquarters Port Operations Section as the reviewer. On this OER, the applicant received sixteen average marks of 4 in various performance categories, a mark of 5 for adaptability, a mark of 6 for health and well-being, and a mark in the fourth spot on the comparison scale, denoting a “good performer, give tough, challenging assignments.” The supporting comments included the following:

Fair start to operational tour. Qualified as MLE Boarding Team Mbr. Quickly learning CG/EMSST ops planning and asset deployment methodology. Deployed as Asst Ops Officer for EMSST support of US Secret Service VIP protection at 2004 Republican National Convention (RNC). Effectively managed largest operational armory in the CG; ... Oversaw 2 successful Waterside Section HLS deployments totaling 50 days; managed Ops, admin & message traffic. Mbr of EMSST planning cell for and deployed to TOPOFF3 WMD multi-agency exercise; stood TAO watches. ... [The applicant] is beginning to understand the complexities of the CG field-level operations arena; Growing in understanding of operations ashore, aviation and multi-agency operations. Eagerly inserted into the CG command and control structure during EMSST deployments to learn CG operations planning and execution processes. With input from mentors, made process improvement recommendations. Highly enthusiastic about organizational process changes; ... 90% complete with MLE Boarding Officer qualification process. Began small boat crew member qualification process ... Completed Air Use of Force, Incident Command System

(ICS) 100-200 training and TCT Command Group Ops courses. ... Superb physical condition. ... Recommended for promotion to LCDR with peers. With continued prof development in leadership, mngt and ops areas, [the applicant] may rise to the challenges of the operations ashore community. [He] is gaining exposure to all facets of CG ops via mentorship and work assignments. [His] teams managed several critical functional work areas of the unit ...

On January 19, 2006, the applicant submitted an OER Reply (Tab H) to this first OER from the EMSST. In his OER Reply, he alleged that the OER was not timely completed or completed by an established rating chain because the unit had not published its rating chain. He alleged that most of the accomplishments he had included in his OER input had been omitted from the OER comments, and he provided four paragraphs listing accomplishments. He noted that he had received two letters of recommendation from the command during the evaluation period praising his competency, leadership, energy, skills, maturity, writing style, and “personal qualities and potential for long-term, continued high performance.” The applicant’s OER Reply was forwarded up the rating chain without comment for inclusion in his record.

The Disputed OER (Tab B)

The applicant’s second OER as the AOO at the EMSST is the disputed OER in this case and covers his service from June 1, 2005, until March 10, 2006. The XO of the EMSST prepared the entire OER as both the supervisor and the reporting officer, but signed it as the CO of the old MSST, and the Chief of the Headquarters Port Security Section served as the reviewer. Block 2 of the OER shows that in addition to being the AOO, the applicant’s collateral duty was to be the Logistics Officer. Block 2 also states, “This OER is submitted under Article 10.A.3.c.1.a. due to performance notably different from the previous reporting period. Per Article 10.A.4.h.1., this OER is a Derogatory Report. ROO [reported-on officer] was removed from primary duties on 03/10/06.” The numerical marks and comments in the disputed OER appear in the chart below.

MARKS AND COMMENTS IN APPLICANT’S MARCH 2006 SPECIAL OER

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	2	Failed to become competent as AOPS. Planning & preparation sub-standard. Inadequate prep for change of command briefs & reliefs resulted in passing of some misinformation to new CO, resulting in ROO being relieved of duties as Interim Dive Officer, & in poor documentation of morale & weapons property which resulted in certain items being unaccounted for. Planned & executed vital dive training including classroom PQS & real dive experience off the coast of NC; Helped divers maintain qualifications while training the team in deep dive intricacies. Assigned as Logistics (LOGS) Section Chief; Undertook new duties with energy, but failed repeatedly to produce work of adequate quality or thoroughness. Displayed reluctance to thoroughly research assigned projects resulting in frequent rework; unit Organization Manual (ORGMAN) consolidation project was carelessly reviewed & forwarded to the command with significant short-comings, despite proscriptive task direction. Provided positive short-fuse logistics support to deploy Law Enforcement Detachment (LEDET) with government vehicle for Katrina response & to support K9 Team deployment to District 9. Made progress on Boat Forces PQS; Successfully completed SAR School; Coordinated TDY assignment to local Sector for LE ops & was certified by that command as Boarding Officer. Received generous compliments for TDY LE efforts, reflecting well on self & command.
3b	Using Resources	4	
3c	Results/ Effectiveness	3	
3d	Adaptability	4	
3e	Professional Competence	3	

4a	Speaking and Listening	4	Briefed 10 visitors from USN explosives command on EMSST & armory training needs, articulated & promoted needs adequately. Significant written work required formatting &/or grammatical corrections. Poor proof reading habits; Often sent written work to XO without adequate review resulting in process slowdowns. Ineffective efforts to develop subordinates & process improvements as Awards Board Chairperson; Processed 35 personal awards; Drafted 2 CG Commendation Medals, 3 Achievement Medals, 3 LOCs & 2 LOAs; Most all work needed editing.
4b	Writing	2	
5a	Looking Out for Others	4	Provided appropriate recommendations & assisted XO with 2 retirement ceremonies. Effectively engaged deployed boat crew members to gauge morale & identify resource needs. Provided mentoring to E5 to seek CPO's Mess Counsel resulting in positive behavioral changes. Moderately successful at leading & coaching E9 EPO towards work process improvements & planning coordination with OPS staff. Wisely prompted command to request external help to prep unit for RE-HS Stan visit, contributing to unit receiving the KIMBALL Award. Recommended Armory staffing changes for better workload distribution & provided solid LOGS support to long-term boat crew deployment mission, overcoming several complex challenges. Demonstrated poor leadership skills that hindered camaraderie & created confusion & communication barriers inhibiting subordinates' team processes; Subordinates often circumvented [the applicant] to gain understanding of tasks & to align work with command direction. Unwittingly created tense workplace climate; Often appeared not to listen to recommendations of peers & juniors; Incorrectly perceived feedback as personal criticism vs. professional development/helpful suggestions. Neglected to properly follow sound leadership principles & COMDT Human Relations guidance to resolve work place misunderstanding.
5b	Developing Others	4	
5c	Directing Others	4	
5d	Teamwork	3	
5e	Workplace Climate	3	
5f	Evaluations	4	
6	Signature of the EMSST XO, signing as the MSST CO and the applicant's supervisor, dated April 17, 2006		
7	Reporting Officer's Comments	NA	[The applicant] was provided abundant leadership opportunities plus command leadership & external mentoring support through-out this marking period, but demonstrate[d] a consistent level of poor preparation & execution of primary & collateral duties ultimately leading to relief of primary duty. [He] lost confidence & trust of command by not taking responsibility & by making careless judgment calls. Delegated too much responsibility without appropriate oversight; Did not vigorously pursue adding value to processes, identifying problems & developing solutions.
8a	Initiative	2	Despite constant command support & counseling, demonstrated declining initiative; Repeatedly requested to be relieved of all collateral duties; Often seemed overwhelmed by normal work load tasking. Ineffective response to mentoring resulted in [his] being required to report to the XO by 0930 each workday to align [his] & team's daily work efforts/objectives with the command. Quality of judgment & responsibility were erratic & showed lack of topical research. Did not build on experiences; Repeated work product errors even after being given specific task direction & exact written feedback to maintain focus. Poor analytical skills; Applied careless approach & inattention during Weapons Officer relief; Tasked subordinate with conducting weapons inventory alone; Cmd ordered new inventory which identified several equipment items missing; [The applicant] seemed at a loss to explain procedural oversights. Showed distinct interest in CG recruiting initiatives; Conducted COMPASS-CGRC recruiting at local college with desirable results. Active, positive role model in community; Coached youth sports & helped with church functions. Committed to health & physical fitness; Maintained superior fitness level & assisted others in realizing same.
8b	Judgment	2	
8c	Responsibility	3	
8d	Professional Presence	4	
8e	Health & Well-Being	5	
9	Comparison Scale	2	[Compared with other LTs, he was rated a "[m]arginal performer; limited potential."]
10	Potential	NA	Not recommended for promotion at this time. [The applicant] lost the confidence & trust of his command, peers & subordinates. Consistent poor performance indicates that he is not prepared to assume duties with increased responsibilities at this time. Recommended for staff/support positions where adequate oversight and mentoring can be applied with a specific road map for improvement/success. Recommended for developmental training that might provide an opportunity to develop sound leadership, judgment & resource management skills.

11	Signature of the EMSST XO, signing as the MSST CO and the reporting officer, dated April 17, 2006
12	Signature of the reviewer, who was Chief of the Port Operations Section, dated May 15, 2006

Applicant's Reply to the Derogatory OER (Tab C)

Because the disputed OER was derogatory, the applicant was entitled to submit an addendum to it, but declined. However, he did submit an OER Reply on July 5, 2006 (Tab C). The applicant stated that after reviewing the OER, he could “see there are several areas of improvement” and that he accepted responsibility for his short-comings in those areas. However, he alleged, the OER unfairly “focuse[d] exclusively on short-comings and [did] not reflect the full measure of my performance or contributions to the unit.”

The applicant also stated in his OER Reply that during his previous assignment at Headquarters, he had been directly involved in the reorganization that effectively resulted in the CO of the MSST losing his command and becoming the XO of the EMSST. Because of his involvement with the reorganization, there was “an unintended adversarial and prejudicial relationship, as I was viewed as a cause of that change.” In addition, the XO told him at the start that he should not have received the assignment because he “did not have the ‘tactical’ field operational skill sets expected of my pay-grade (i.e., qualified boarding officer), so my capabilities were misjudged.” The applicant noted that his decision to submit an OER Reply to his first, mediocre OER from the EMSST may also have contributed to the XO’s decisions with respect to the disputed OER.

The applicant alleged that the OER is erroneous in that it claims to document his removal from his primary duties on March 10, 2006, when in fact he was relieved of his operational duties as an AOO in July 2005. He believed at the time that his new assignment as the Logistics Officer was not a removal *per se* but a “change [that] was a part of the normal transfer season and the unit’s reorganization to align with ICS and Sector organizations. Further the change to Logistics Officer, a Section Chief position, was broader in scope and responsibility.”

The applicant alleged that he “received no ‘failure to perform’ counseling prior to [his receipt of his] 31 May 2005 OER.” Because of that mediocre OER, he submitted an Officer Support Form on December 28, 2005, “to more clearly identify my responsibilities and command expectations,” and he “also initiated a daily check-in with [the XO] to align priorities and provide visibility of on-going projects and workload. Meetings were initially constructive but became increasingly unproductive as the larger unit’s organizational uncertainties—structure, manning, and mission got in the way of routine business.”

The applicant alleged that he requested a “short tour”—i.e., an early transfer—to “any established operational assignment,” and that his request was approved by the actual CO of the EMSST and forwarded to the Personnel Command. In anticipation of receiving the expected transfer orders, he asked to be relieved from his collateral duties to focus on his primary duties. The CO granted this request and so he “initiated the appropriate reliefs.”

Regarding the OER comment about passing misinformation to the new CO of the EMSST, the applicant stated that he was “asked about a requirement to have a unit basic dive

officer” and replied that “it was not mandatory.” However, the “EMSST CO believed it was. I immediately updated him with the correct information and references.”

Regarding the OER comments about delegation and oversight, the applicant stated, with respect to the ORGMAN, that his delegation of the ORGMAN consolidation project had been approved and the delegee reported directly to the XO. Regarding the missing weapons equipment and the inventory, he stated that in passing on his collateral duty as the Weapons Officer, he did not perform a wall-to-wall inventory, but when some items were found to be missing, they performed a second inventory. Three weapon sights were missing and he reported their absence and “instituted serialization of all weapon sights to prevent future occurrences. The relief process identified systemic problem that only periodic R865 inventory reports would detect.” He noted that there were no incidents or injuries while he was the Weapons Officer. Regarding the OER comment about morale equipment, he stated that his relief as Morale Officer asked about some bicycles at the unit which were “believed to be morale gear though not on [the] inventory or purchased with morale funds during my tenure.” The applicant reviewed the books and questioned his predecessor in the Morale Officer position but could not find any record of the bicycles. He stated that the bicycles had been “purchased with evergreen funds,^[2] located later in non-morale spaces and placed in inventory.”

The applicant further stated in his OER Reply that he assumed the Unit Dive Officer position without a formal turnover by his predecessor; created a dive inventory and equipment status report; researched, procured, and replaced dive equipment; corrected an outstanding “PMS”; completed new diver assessment interviews for the dive school; developed a plan that enabled the unit to maintain and sustain its dive capability; deployed eight divers to a joint military research project in Rhode Island; and planned and executed more than sixty dives in a five-day period. In addition, he developed an electronic report tracker allowing the command to monitor required reports, completed the required motorcycle safety course for fifteen members, and completed the first version of the unit’s M240 standard operating procedures.

After his departure from the EMSST, the applicant was temporarily assigned to the Sector Response Department. On July 5, 2006, the Sector Commander advised the command of the EMSST, which had been renamed as a Maritime Security Response Team (MRST), that between May 17 and June 9, 2006, the applicant had completed 70 percent of his Boat Force PQS, participated in numerous Sector activities, and learned about the Sector organization (Tab I).

The applicant was then transferred to serve as a contingency planner at the Atlantic Area Contingency Planning Branch. On his OER for this work (Tab J), he received four marks of 5, eight marks of 6, and six marks of 7 in the various performance categories and a mark in the fifth spot on the comparison scale, denoting an “[e]xcellent performer, give toughest, most challenging leadership assignments.” In addition, he was strongly recommended for promotion.

On June 13, 2007, the applicant resigned his regular commission and returned to the Reserve. He remained in the Individual Ready Reserve without an assignment from June 13,

² The Coast Guard Foundation raises funds for the Coast Guard Auxiliary and maintains an “Evergreen Fund” to provide education, recreation, fitness, and morale equipment for Coast Guard enlisted members and their families.

2007, through May 31, 2008. On June 1, 2008, he was assigned to serve as the Senior Reserve Officer in the Response Department at Sector Los Angeles-Long Beach and as such was responsible for five Reserve officers and 22 petty officers on two Reserve Sector Boarding Teams and Marine Environmental Response Teams. The applicant has received two outstanding annual OERs (Tab K) for this work with performance marks of 6 and 7 (highest) and marks in the fifth spot on the comparison scale, denoting an “excellent performer; give toughest, most challenging leadership assignments.” He was strongly recommended for promotion in both of these OERs. However, in 2008 and 2009, he failed of selection for promotion as a Reserve officer with the disputed OER in his record. (Tab L)

VIEWS OF THE COAST GUARD

On May 11, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion (Tab M) in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC admitted that the applicant was issued orders assigning him as the OO of an MSST and that due to the unit’s reorganization as an EMSST, the OO position was filled before he arrived at the unit. Therefore, the command “tried to keep him in assignment” by making him an AOO, responsible for assisting the OO with operational execution of the EMSST. The PSC noted that in his OER Reply, the applicant stated that at his prior assignment at Coast Guard Headquarters, he had been “directly involved in the unit’s organizational change from two independent units into a single command.” The reorganization involved merging the MSST with a tactical law enforcement team (TACLET) to create an EMSST and, ultimately, a Maritime Security Response Team with a new organizational structure. The PSC noted that in the applicant’s reply to the first OER that he received as the AOO, he cited several alleged policy violations but never complained about not having been assigned as an OO in accordance with his orders.

The PSC alleged that in assigning the applicant as the AOO following the reorganization of the unit, the command “carried out its duties in accordance with policy found in U.S. Coast Guard Regulations, COMDTINST M5000.3B, Article 7-5-1B (Internal Routine and Administration of the Unit).” The PSC stated that under these regulations, the CO “may assign a commissioned or warrant officer to duty other than the type specified in the orders assigning the officer to the unit.” However, the PSC stated, “it seems that the applicant could not perform the duties of AOO, a position with even lesser responsibilities than the Ops Officer. Based on these facts, it is believed the applicant has not provided any evidence to substantiate his claim that he was disadvantaged by not being placed in [the] position assigned per [his] assignment orders.” The PSC further alleged that the applicant’s assignment as the collateral duty Logistics Officer resulted from the reorganization of the MSST and TACLET and that assignments to collateral duties are also authorized under Article 7-5-1B of Coast Guard Regulations.

Based on the applicant’s first OER while assigned as the AOO of the EMSST and his reply thereto, the PSC alleged that there “is no evidence that substantiates the applicant’s claim that policy was not followed and that he was not given substantial opportunity to progress and become skilled in his position.” The PSC noted that the applicant admitted to areas of poor per-

formance in his OER Reply and alleged that that poor performance caused the command to lose confidence in his capacity to carry out his duties as the AOO. Therefore, the PSC stated, his allegation that his lack of aptitude for and failure to complete the tactical training course caused his removal from his AOO duties and assignment as the Logistics Officer is not substantiated.

Regarding the applicant's request to have the disputed OER removed from his record, the PSC stated the following:

Removing an OER because the applicant was not placed in an opm-2 assigned position might seem plausible if the applicant was placed in a position not commensurate to that which was originally assigned. In this case, the applicant was assigned AOO by the Commanding Officer because the Operations Officer position was already filled. The AOO was responsible for assisting the Ops Officer with operational execution of the EMSST. ... While performing duties as AOO, the applicant could not perform to the standard required. If applicant is unable to perform as Assistant Operations Officer, it is a logical conclusion that the applicant could not manage the more detailed duties of Operations Officer; therefore the disputed OER should not be removed.

The PSC concluded that the XO "was well within his rights to assign the applicant to the position of [AOO] upon his arrival" and "was in the best position to observe the applicant's performance and provide a fair, accurate and objective OER." The PSC argued that there are no grounds for removing the disputed OER because the applicant did not prove that it is inaccurate.

Statement of the XO of the EMSST (Tab N)

The XO stated that he was the CO of the MSST and his "additional responsibilities included conducting duties as assigned in the functional role of Executive Officer of the EMSST." As the CO of the MSST, he served as the supervisor and the reporting officer of the disputed OER. The XO stated that the applicant was not disadvantaged during the period covered by the disputed OER as a result of not being the OO of the MSST. At the time, "all or almost all officers at the EMSST were engaged in duties outside their assigned PCS positions" because of the reorganization. The applicant "was therefore in a similar position as the entire wardroom of both MSST ... and TACLET ... regarding assigned and functional duties."

The XO stated that the applicant "was given multiple opportunities to fulfill the duties and responsibilities as close to his assigned position as possible given the unique organizational situation of the unit." Because the EMSST had an OO, the applicant was assigned as the AOO, which gave him "multiple assigned primary and collateral duties that allowed him to participate in a broad range of leadership and managerial responsibilities aligned with an Operations Officer position. The command worked closely with [the Personnel Command] to make sure that all officer OERs were carefully crafted to not disadvantage any officers because of the unit's unique organizational situation and that actual performance was properly documented to support the assigned officers' career progression."

The XO stated that the applicant "knew exactly what he was getting into prior to executing his PCS orders to the EMSST. He was previously assigned to the CGHQ program manager office for the EMSST and knew of the unit's new mission set, new organizational structure and that all officers were performing duties outside of their assigned positions." Therefore, the XO alleged, the applicant was aware that he would not be working as the OO of an MSST when he

received his orders. Moreover, the XO alleged, he was told “by multiple officers and civilian government contractors that [the applicant] knowingly and actively solicited and subsequently accepted orders to the EMSST in order to pursue duties as a Direct Action Team (DAT) Leader.” The XO stated that the applicant said himself that he desired to serve as a DAT Leader at the EMSST. The applicant “was given the opportunity to do so by being assigned to complete the required DAT training.”

Statement of the OER Reviewer (Tab O)

CAPT S, who served as the reviewer for the disputed OER, stated that he does not support the applicant’s request that it be removed from his record. The reviewer stated that his direct interaction with the applicant was limited but he made several visits to the EMSST and had at least two long telephone conversations with the XO about the applicant’s performance. Based on his observations and their conversations, he believes that the command gave the applicant “every opportunity to be successful” and that “it was his failure to perform at the level expected of an O-3 that ultimately led to the marks he received on his March 2006 OER.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 22, 2009, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. He was granted extensions and submitted his first response on August 6, 2009, and his last response on January 30, 2010. (Tabs P and Y) He submitted additional allegations and evidence and amended his request for relief to include removal of his failures of selection for promotion to lieutenant commander (LCDR). (Tab Q)

The applicant argued that the disputed OER should be removed because there was no published rating chain for the EMSST and that the XO improperly served as both his supervisor and reporting officer even though he was not the CO of the EMSST. In addition, he stated that he recently learned that in 2007 the OO of the EMSST requested removal of the XO from his rating chain, and that request was granted by the Personnel Command. The applicant stated that he would have taken this step in 2006 if he had known that it was allowed, but he had been called to active duty from the Reserve and did not know the rule. In this regard, the applicant alleged that the XO felt cheated out of his command and was strongly prejudiced against the applicant because he had worked in the Headquarters office that recommended the reorganization. The applicant alleged that his work environment at the EMSST was tense with “signs of hostility” and the XO “continuously reminded me that if ‘he failed I would fail’. He also would constantly threaten to put on his command pin since he felt he was cheated out of command; I reminded him that was not the case and it was simply done [to] capture personnel billets to form the EMSST.”

The applicant argued that the OER should also be removed because it erroneously states that during the evaluation period his primary duty was being the AOO of the EMSST and that the OER was required by his removal from that duty in March 2006. The applicant noted that in fact he had no operational duties as of July 2005 and his primary duty during the evaluation period was being the Logistics Officer. With regard to the removal of his operational duties, the applicant alleged that whereas other members were allowed to retake the tactical training course

when they failed to complete it successfully, he was not allowed to do so although he had completed 95% of the training. The applicant stated that his AOO title “was a shell” during the evaluation period for the disputed OER because he “had no interaction with [the] person assigned as Operations Officer,” which is why the Operations Officer did not serve as his supervisor for the disputed OER. Instead, he was asked to perform the functions of logistics, finance, and administrative officers, but he had no background in these duties “of any sort of the new job [he] was now being requested to perform.” The applicant noted that such functions are normally performed by a chief warrant officer with many years of experience in his or her specialty. The applicant alleged that by never allowing him to serve as the Operations Officer and assigning him to duties for which he had no experience, he was set up to fail. Because he was assigned to the Logistics position for which he had no experience, he asked to be transferred during the next transfer season (summer 2006), and the CO of the EMSST granted his request. However, while he was still at the EMSST, the unit “became more dysfunctional and [his] professional relationship with [his] supervisor deteriorated.”

The applicant alleged that the organizational changes he was expecting when he arrived at the unit never occurred. Instead, the two units—the MSST and the TACLET—that were supposed to merge continued to run independently the entire time he was assigned to the unit. The official directions provided by Headquarters changed swiftly. The applicant stated that “there was confusion in the organizational structure There was not a clear career path for personnel assigned. . . . There was no defined reporting chain, OERs were submitted late, there was no description of an Asst Ops position (it was a shell) and [he] did not report to the OPS Officer. . . . Functionally, there was no Operations Officer [of the MSST] either.” The applicant alleged that the XO’s affidavit shows how confused the unit was because the XO functionally served as the XO of the EMSST but signed documents, including the disputed OER, as the CO of the MSST and sometimes claimed to be the CO, which created confusion.

The applicant noted that his statement in the OER Reply that he could see several areas for improvement in his work and accepted responsibility for the areas in which he failed the command and himself does not mean that he agreed that the OER was fair. The applicant argued that the disputed OER is unfair because he “was not able to do the job my orders stated and [was] asked to perform a job [he] had no training or experience to do.” He asked the Board to review his performance records from before and after his assignment to the EMSST as they show that the disputed OER does not reflect his overall performance in the Coast Guard.

The applicant submitted several statements, emails, and other documents in support of his allegations, as summarized below.

Statement by the OO of the EMSST (Tab R)

LCDR E, the OO of the EMSST, stated that in August 2007 he learned that the XO, who was his supervisor but not his reporting officer, had submitted his OER late and with few comments to support the marks. The CO of the EMSST told him that he had “grave concerns” about the OER the XO had prepared. At about the same time, he learned that the XO had requested the removal of the CO. Because the OO did not believe that the XO was providing a fair and unbiased OER, he asked that the XO be removed from his rating chain, and the request was

granted. The CO of the EMSST served as both his supervisor and reporting officer. Thereafter, a lengthy investigation ultimately determined that the CO's removal was not warranted although areas for improvement were identified.

Statement by the Applicant's Previous Supervisor (Tab S)

In a letter dated August 4, 2009, the captain who served as the Chief of the Office of Tactics and Special Missions at Coast Guard Headquarters from February 2004 to July 2006 stated that the applicant worked on his staff until he was transferred to the EMSST in August 2004. He stated that the applicant had "a keen analytical and pragmatic mind along with a ferocious work ethic. Because of his past background in security and law enforcement along with his highly professional demeanor," the captain endorsed the applicant's request for appointment as the OO of the EMSST, which was to evolve into a Maritime Security Response Team (MSRT).

The captain further stated that the leadership of the EMSST was "immersed in many uncertainties" and challenges in trying "to develop an initial operational capability with very high readiness standards using new equipment and aggressively conduct training and exercises. ... Over time, though my communications with Atlantic Area (Aof) senior staff ... and personal visits to the SRT/MSRT it became apparent to me that the existing command culture was detrimental to both the operational capability of the unit and the professional development of the newly assigned personnel." The captain stated that the command issues were not resolved and continued to fester so that even after he retired in July 2006, he was interviewed pursuant to an "administrative investigation into the MSRT for its tardy development as an operational unit, failure to train, and numerous reported personnel problems—all indicative of a very poor command climate."

The captain stated that he spoke to the applicant periodically as a mentor. The applicant "would tell me his observations, his concerns, and his inability to both communicate ideas and demonstrate his abilities to his executive and commanding officers due to what I believe was their pre-disposed distrust of [the applicant] based on his earlier planning experiences at Coast Guard Headquarters." The captain stated that the applicant "was frankly working against a stacked deck; i.e., pre-disposed opinions by the command on how it should be formed and organized. Unfortunately for all involved, those ideas ran contrary to the vision outlined by Coast Guard Headquarters and operational guidance being provided to it by Atlantic Area."

The captain stated that the XO "was ill-equipped to fulfill his command responsibilities and resented [the applicant's] earlier exposure to Headquarters discussions on the SRT/MSST's development and operational role within the Coast Guard." The captain also stated that the XO was unable to work through the stresses of the reorganization, which created a leadership gap, and that the applicant was "a principal casualty." Therefore, he recommended that the disputed OER be removed from the applicant's record.

Endorsement Letters Written by the Command of the CO and XO of the EMSST (Tab T)

On December 10, 2004, the CO of the EMSST strongly endorsed the applicant's application to serve on the Commandant's Diversity Advisory Council. (Tab T) He wrote that the appli-

cant “consistently displays exceptional performance in his duties” and had adapted quickly to juggling the tasks of a “fast-paced, high-pressure billet” as the AOO. He stated that the applicant had the maturity, leadership, skill, and education necessary to serve on and benefit the council.

In an undated letter, the XO endorsed the applicant’s application to become a White House Fellow. (Tab T) He identified himself as the applicant’s supervisor but not as his CO. He highly praised the applicant’s maturity, public speaking, writing, intelligence, understanding of organizational functionality and business and management practices, leadership characteristics, and devotion to self improvement. He also wrote that the applicant was very passionate about his career and work, but that this passion “must be tactfully and carefully managed so that he does not out step the pace of others or the overall organization. I would like to see [him] focus more on the singularity of some tasking than on the big picture. He is an outstanding officer and would serve his subordinates even better by supportively shaping their behavior based on his understanding of where the unit needs to grow to facilitate future success.”

Emails about the Applicant’s Duties as AOO (Tab U)

On April 25, 2005, the applicant sent the OO and the XO an email asking for the staffing plan and the MSST manual. He wrote than “[e]verything should not be according to the DAS. ... This needs to [be] undone and balanced. These guys are not as good as they think, it takes years to get good in the game. ... I think stability and going back to basics are key to moving this unit on. ... By the way 5 different directions, w/o the correct infrastructure to support it (people resources, office space, and trng fac’s) is a set-up for failure. Everyone needs to be on the same sheet of music and operating as 1 unit (ENOUGH OF THE BS), the original vision is not playing out and the naysayers are loving it. We (EMSST, LANT, OPC) need to slow the roll and re-think a strategy for success; maybe use some of the momentum from T3. I hear we did OK in the eyes of some Sr folks from the CG and FBI.” The OO replied, stating that the staffing plan was not yet complete and that the MSST manual was available online.

On May 9, 2005, an ensign who was Officer in Charge of a division sent the applicant and the XO an email expressing concern over the lack of appreciation that had been shown for his crew’s work at a meeting that morning. The XO replied that the ensign should have whispered in their ears to make sure his people were adequately praised. He noted that it was not any one person’s job to keep “track of all the crap that’s happening at the EMSST” and also that he had asked multiple times at the meeting whether there was anything else that should be said, and if anyone had mentioned the return of the division, it would have “sparked my memory to say a few nice things. ... Continue to grow in your full-spectrum understanding and be part of the solution. My EMSST complaint crapper is full.”

On May 10, 2005, the ensign responded, saying “Completely understood, my fault again. Sorry of the inconvenience. I will work on a way to remind myself to remind everyone else. This was not a complaint, merely me taking the time to inform you of some of your crew’s concerns which I addressed by supporting you as soon as I had my welcome back speech to all of them. My apologies for letting them down. I will speak to them all once again to ‘clear the air.’” The XO responded to the ensign and the applicant saying, “Let’s talk over a beer this

Friday? You're both busting ass and I do care. You just need to help me help you & your crew."

On May 10, 2005, the applicant sent an email indicating that his titles were MSST Operations Officer and EMSST Weapons Officer. The XO replied with an email about "YOUR JOB TITLES," stating that the "MSST does not exist ... You are the EMSST AOPS & WEPO & soon to be DIVEO. Your OER will read MSST/OPS MSST DIVEO/EMSST AOPS/EMSST WEPO. Please use the EMSST AOPS & WEPO titles for all correspondence." (Tab V) The applicant replied, "I was attempting to get a point out ... suggest there be something sent out to all hands as to what the organization looks like and whom is responsible for what ... it's the best kept secret here."

On May 11, 2005, the XO sent an email to his junior officers noting that a scheduling conflict, which should have been identified, resulted in three enlisted members not being able to attend important training and asking them to look for process improvement options. The applicant responded to the XO recommending that one of his fellow junior officers be named the Training Officer because the unit had

a huge, sucking chest wound and no accountability in the training dept. ... This email is ineffective band-aid and someone [name omitted] needs to take ownership for training and put this unit in a better direction. ... Everyone is going different directions, and only concerned about themselves or their element. ... this unit needs to come together to be effective, whom are we trying to kid. LANT should be briefed of a momentary pause to re-group and take a different course. I believe there is a plethora of things to point to for justification. I say this knowing this is a hard thing to do, however, this has gone on way too long. There are a ton of outside experts and influences running this unit and the unit needs to run itself.

Training [is] an important element to this puzzle and it as well as others need to be defined. This craziness will continue and as the word continues to spread [about] what really happens here ... no one in their right mind will want to come. Kind of hard to lead when no one follows. Training needs to be properly documented and plans need to be prepared to sustain the operation elements ... the CG way; we are not doing justice to the troops, especially if there is no balance.

The way we are going is ass backwards; sorry, it [is] hard to stay under that radar when others are not; BLIND leading the BLIND; I'd love to see the results of a blind survey of our folks of how they really feel and want to do here.

We continue to try to put a circle into a triangle and at the end of the day all I can feel good about is taking care of my folks, which breeds the divisions the unit faces. My fun meter is beginning to get pegged and the BS flag needs to be raised. We have really smart folks and I'm certain they see the same thing. We are tasked to be the EMSST w/o proper staffing, resources or permanency for the EMSST prgm. This is impossible to pull off and we are setting ourselves up for failure. Current tasking is pulling us apart as well; Maybe the big picture is to do just that ... if that is the case tell us.

A poss fix could be changing the MSST to the EMSST (CT capability) which would include the DAS-ATFP section, WE, SUPPORT, K9, CBRNE, and rolling in a defined relationship w/ the AVDET; then of course providing the right flavor of billets for success. Then roll out the LEDETS stuff to FL and bump the CO to an O6. Again, I know this [is] hard to do ... it's really not that hard.

WIPE the slate, start over—what a mess!

Very respectfully,
[Applicant's name]

In response, the XO recommended that the applicant “[f]ix your part of the world and make recommendations where you see opportunities, but realize that you’re experiencing what many of us more senior than you have always experienced. Welcome to CG field level leadership! Why do you think I harp on processes? I’m trying to bracket and control what I CAN control. ... Highly suggest you adopt a similar attack plan, or you’ll go mad in short order. :-)”

On June 16, 2005, a lieutenant junior grade (LTJG) assigned to the EMSST advised the XO and the applicant that an inventory of the armory had shown that all weapons, sights, and ammunition were accounted for. The XO asked about the “pyro.” The LTJG stated that he had not been told to inventory the pyro. The XO then forwarded this reply to the applicant and wrote, “I’m looking to YOU to tell me the status of the pyro. ... telling [the LTJG] to see GM1 in an email doesn’t cut it with me.” The applicant replied that he thought the inventory had to be done by someone who did not work at the armory and advised the XO that all of the pyro had been accounted for by the GM. He also noted that he had “had some recent miscomm’s w/ you and we should get together when you have time. I’m still feeling out my way of what exactly you want sometimes.” The XO responded, “Life as a JO is easy ... listen to exactly what the XO says and do exactly that! We’ll meet on Wednesday and I’ll present you with your way ahead. NOTE —it shall be much different than the way you came! If you note a sense of displeasure with your recent work in my tone, you are correct in your reading of my feedback.”

Emails after the Applicant’s Reassignment as Logistics Officer (Tab W)

On August 2, 2005, the XO sent an email to the applicant and the OO about a report the applicant had submitted entitled “Brief OPS on the LE sub-gp.” The XO stated the following:

Let’s all clarify something here ... there’s nothing to brief [Applicant]! For the last time, you need to stay away from the local CG LE community! You keep wanting to inject yourself into Sector Hampton Roads AOR! Stop! We DO NOT attend local LE meetings unless invited for specific reasons and OPS gets approval from the CO to represent the EMSST. The Sector has its job with the locals. We have other missions that may coincide with theirs, but we have no business over there talking up the locals on what the EMSST does. Let the Sector LE Officer do his job. They’ll call us via Area if they need us!

You need to be focused on your Dive tasks per the CO and your new Logistics job duties. Your only activity into MLE shall be to complete your [boarding officer] cert.

The applicant replied that his “intention was to advise OPS of the work grp as I continue to move OPS related items to OPS.” The XO replied to the applicant and the OO that “[t]he 3 of us will have a coming to Jesus meeting next week guys. The world just changed for [the applicant] and both of you are being affected. We will map out your success paths. Hint ... more manager tasks and less cool boy games! We’ve got a unit to run and you’re my senior managers so welcome to the new game.”

On August 7, 2005, the XO sent the applicant an email noting that as the Logistics Section Chief, he now “owned” weapons, maintenance, administration, supply, and medical but that

the Weapons Officer job would soon go to someone else. He included a long list of the applicant's regular administrative responsibilities, as well as some "future work," including the FY06 budget and his diving, boarding officer, and boat crew qualifications.

On August 18, 2005, the applicant sent an email to an HS1 about meeting somewhere for turn-over on September 1st and a leave request that the HS1 had submitted. He cc'ed the email to the XO, who responded, "For the last F'ing time ... stop copying me on your emails!!!"

On September 29, 2005, the XO sent the applicant an email with the subject line "WHAT THE \$%^&?," saying, "Just kidding ... Thanks for all you're doing to make this place better :-)"

Also on September 29, 2005, the applicant exchanged emails with a lieutenant commander asking about his pending "short-tour" transfer to another unit. (Tab X)

On October 15, 2005, the XO sent an email to the applicant denying a request to shift some work to the Operations Officer. (Tab W) The XO further noted the following:

You need to take a firm grip on the reality of your job requirements. You have great people working for you. It appears to me from your seemingly scattered work practices and last minute actions that you're having trouble because you don't know what the heck you're supposed to do. You need to take my advice and create the annual reports and work project tracking tool I ordered you to complete. It will give you control and piece [sic] of mind! You're just trying to keep up now [Applicant] and you need to devise a method to actually stay ahead of the work, or you will constantly fail in your duties.

All of the unit's recent 'late submissions' have come from your Section! That's going to cost both you and I on our OERs! I'm through making any more "I'm sorry for that Sir" comments to the CO because someone else missed a known/published due date, or turned in crap at the last moment.

Your "We need to slow down" words are not actionable. They never are for any operational CG unit. I've been telling you that since you reported here. We're sailing and you're on board for the cruise sailor!

First fix your own LOG processes, then ID points of synergy between the LOGS and other Sections, then brief me on proposed changes to your processes.

You must build the work/project tracking tool I ordered you to develop before you can forward any work load data to me and expect me to give any credibility to your Section's level of work. Personnel issues will always be a joint venture between LOGS and OPS as we (support pers) attempt to meet OPS' staffing requirements. No one works in a vacuum and to simply shift the entire work load is not realistic. We have to develop a team approach (process) with everyone's roles being clearly defined.

A better action than asking to shift the work would be to tell the XO you've identified a problem, take it on as a quick project and show me what great managerial things you can do as a competent JO. I highly recommend you adopt this leadership 101 process change:

- ID problem
- Conduct research
- Develop solution options
- Brief supervisor on prioritized solution options and pro-cons for each—provide cost data if applicable

On October 25, 2005, the XO stated in an email that he had received a notification about having a “worklist item for” the applicant in the Direct Access database and asking the applicant if he needed another e-resume endorsement. (Tab X) On January 17, 2006, the applicant sent an email to the Assignment Officer about his request to transfer and noted that although he had been assigned to serve as the OO of the MSST, he was actually the Logistics Officer and the Dive Officer and wanted “the opportunity to develop additional operational skills for continued career progression.” On January 19, 2006, the applicant received an email from the Sector New Orleans Response Department stating that it was not known whether the applicant would be transferred or, if he was transferred, whether his prior billet would be gapped or filled until 2007. The applicant replied that his command had “endorsed my short tour request w/ a replacement for AY06.” (Tab X)

Statements of a Prior Commanding Officer and Executive Officer (Tab Y)

CAPT H, a retired Navy captain, stated that as a Reserve officer, the applicant deployed to the Middle East twice under his command with a Harbor Defense Command Unit following the bombing of the USS COLE. He stated that the applicant “was the finest junior officer and one of the most capable operational leaders in the command. He was proactive, direct, and courageous.” CAPT H strongly recommended that the “questionable OER be expunged” and that the applicant be permitted to compete for promotion again.

The XO of the Harbor Defense Command Unit wrote on behalf of the applicant that she had worked with him for more than two years at the deployable Navy Reserve unit with both Navy and Coast Guard personnel. The XO stated that when called to extended active duty overseas, the “rigors of this operational command revealed [the applicant’s] integrity and competence” and that he often completed demanding tasks above his pay grade to ensure the success of their mission. She recommended that the disputed OER be expunged and that the applicant be allowed to compete for promotion again.

COAST GUARD RESPONSE TO THE APPLICANT’S SUBMISSIONS

Under 33 C.F.R. § 52.26, if an applicant amends his request for relief or submits significant new evidence after his application has been docketed, his application is considered newly complete as of the date the last new evidence or amended request for relief is received, and the Board forwards the applicant’s new submissions to the Coast Guard for further review. In light of his new evidence and amended request for relief, the applicant was advised of this rule, and his submissions were forwarded to the Coast Guard with an invitation to submit a supplemental advisory opinion. On April 1, 2010, the JAG informed the Board that the Coast Guard would not submit a response. (Tab Z)

SUMMARY OF THE REGULATIONS

Article 7-5-1 of Coast Guard Regulations,³ entitled “Assignment to Duties by the Commanding Officer,” states the following:

³ U.S. COAST GUARD, COMDTINST M5000.3B, COAST GUARD REGULATIONS (Change 2, October 1994).

A. Subject to such restrictions as may be imposed by these regulations or by a senior in the chain of command, the commanding officer of a unit shall assign commissioned and warrant officers to departments and divisions, to stand watches, and to perform collateral duties, in such manner as to achieve the maximum efficiency of the unit as a whole and to effect an equitable distribution of work among the officers attached.

B. When circumstances require, the commanding officer may assign a commissioned or warrant officer to duty other than the type specified in the orders assigning the officer to the unit. When, under the authority of this section, an officer is assigned for a period of more than 30 days to perform duty in lieu of the type specified in the officer's orders, the commanding officer shall report the fact to the Commandant.

Article 10.A.1.b.1. of the Personnel Manual⁴ states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.1.c.4. b. of the manual states that each officer is normally evaluated by a “rating chain” of three superior officers, including the supervisor, who is “[n]ormally, the individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements”; the reporting officer, who is “[n]ormally the Supervisor's supervisor”; and the reviewer, who is “[n]ormally the Reporting Officer's supervisor.”

Article 10.A.2.b.2.b. of the manual states that one of the CO's duties is to “[d]esignate and publish the command's rating chains.”

Article 10.A.2.e.1.e. of the manual states the following regarding circumstances in which one officer may serve as both supervisor and reporting officer:

The following officers in the grade of LT or above, or civilian members of the Coast Guard Senior Executive Service (SES), can be both Supervisor and Reporting Officer for their immediate subordinates:

- (1) Commanding officers.
- (2) Headquarters: assistant commandants, directors, deputy directors, office and division chiefs.
- (3) Deputy commanders, executive officers, chiefs of staff, division and branch chiefs at:
 - (a) Area Commands.
 - (b) Maintenance and Logistics Commands.
 - (c) Districts.
 - (d) Headquarters units.

Any exceptions not specifically cited herein must be authorized by Commander (CGPC-opm) or Commander (CGPC-rpm).

Article 10.A.2.g.2.b. of the manual states that a rating official may be disqualified if he or she is relieved “for cause due to misconduct or unsatisfactory performance” or is “an interested party to an investigation or court of inquiry” or in “any other situation in which a personal inter-

⁴ U.S. COAST GUARD, COMDTINST M1000.6A, COAST GUARD PERSONNEL MANUAL (Change 40, October 2005) (hereinafter PERSMAN).

est or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.”

Article 10.A.3.c. of the Personnel Manual states the following regarding special OERs:

1. Special OERs. The Commandant, commanding officers, higher authority within the chain of command and Reporting Officers may direct these reports. The circumstances for the Special OER must relate to one of the situations described in subsections a. through e. The authorizing article listed below should be cited in Section 2 of the OER along with a brief description of the circumstances which prompted the OER’s submission. [Example: “This OER is submitted under Article 10.A.3.c.(1)(--) due to ...”]. Special OERs present unique preparation problems ...

a. A special OER may be completed to document performance notably different from the previous reporting period, if deferring the report of performance until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection or reassignment. This report should not normally reflect performance that is reportable under Article 10.A.3.c.1.b. Notably changed performance is that which results in marks and comments substantially different from the previous reporting period and results in a change in the Section 9 comparison or rating scale. This OER counts for continuity.

Article 10.A.4.c. authorizes the supervisor to prepare the numerical marks and comments for the first 13 blocks on an OER, while the reporting officer prepares the marks and comments for the last 5 blocks, as well as the important comparison scale mark and the block for comments about an officer’s potential for promotion and higher leadership positions.

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 applicant 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.⁵

3. The applicant asked the Board to expunge from his record his OER for the period June 1, 2005, to March 10, 2006, and also to expunge his failure of selection for promotion to lieutenant commander. (Tabs A and Q) The Board begins its analysis by presuming that the disputed OER in an applicant’s military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.⁶ Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s

⁵ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”).

⁶ 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases, including disputes over OERs, prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.⁷ To be entitled to relief, the applicant cannot “merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense,” but must prove 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.⁸

4. The applicant alleged that although he was issued orders by the Personnel Command to serve as the OO of an MSST, he was improperly reassigned by his command to serve as an AOO and an assistant Direct Action Team leader, which was a position for which he did not have the proper background and was not allowed to gain the necessary experience progressively. He alleged that he would have succeeded if his duties had been limited to the managerial duties of an OO. Moreover, he alleged, after he failed a single tactical training course, he was again improperly reassigned by the command from his operational duties to an entirely administrative position as the Logistics Officer, another position for which he did not have the proper background or training. The Coast Guard argued that the command had authority to reassign the applicant under Article 7-5-1 of Coast Guard Regulations⁹ and that the reassignments were necessitated by the merging and reorganization of the MSST and a TACLET. (Tab M) The Coast Guard noted that the applicant was aware of the pending merger and reorganization before he sought and received the assignment from the Personnel Command. (Tab N)

5. The Board finds that the applicant has failed to prove by a preponderance of the evidence that his assignment as the AOO of the EMSST and as an assistant direct action team leader was erroneous or unjust. To the extent that he actually assisted the OO as an AOO, his duties cannot have been significantly different than those he would have had as the OO. As an assistant team leader, the applicant may have had less tactical experience and training than other team leaders at the EMSST, but his training record shows that he had previously received extensive training in law enforcement, leadership, and operations. (Tab F) In addition, while assigned to the EMSST, he attended several additional operational training courses. (Tabs B and G) Furthermore, this reassignment was necessitated by the merging and reorganization of the MSST and a TACLET into the EMSST. (Tab N) As noted by the JAG (Tab M), under Article 7-5-1.B. of Coast Guard Regulations, a CO may reassign officers within their commands when circumstances require it.

6. The emails between the applicant and the XO show that in July 2005, shortly after the evaluation period for the disputed OER began, the applicant was removed from his operational duties and assigned purely administrative, financial, and logistical duties as the Logistics Officer of the EMSST, a nominally collateral duty. (Tab W) According to the applicant and the XO, the reassignment to this new position was due to the reorganization of the EMSST, but the

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

⁹ The Board notes that in the advisory opinion for BCMR Docket No. 2008-106, the JAG argued that an applicant was entitled to relief because his reassignment by the command constituted “legal error” since only the Personnel Command had authority to issue officer assignments. The Board, however, strongly disagreed with the JAG’s finding of legal error and found no error or injustice in the disputed OER but granted relief based solely on the JAG’s recommendation.

applicant may well have been the junior officer chosen for this new administrative position because of his relative lack of experience as a DAT leader and his failure to complete a particular tactical training course. (Tabs A and N) Under Article 7-5-1.A. of Coast Guard Regulations, a CO may assign officers to duties to maximize the efficiency of the unit as a whole. Therefore, the applicant's reassignment as the Logistics Officer of the EMSST, with responsibility for managing the unit's administrative, finance, and logistics personnel, was not illegal. However, under Article 7-5-1.B., the command is supposed to notify the Personnel Command if the reassignment lasts for more than 30 days. The fact that the disputed OER (Tab B) states that his primary duty throughout the evaluation period was AOO of the EMSST indicates that the command never received the Personnel Command's approval of the applicant's reassignment. Moreover, the record shows that the applicant had little to no experience or training for this work. (Tabs E and F) In the Board's experience, Logistics Officers responsible for all of the administration, finance, and logistics of an operational unit are often chief warrant officers with years of experience,¹⁰ as the applicant alleged, and it is doubtful that the Personnel Command would have assigned him to such duties or concurred in the reassignment given his training and experience.

7. The disputed OER states that the applicant's primary duty during the evaluation period was to be the AOO of the EMSST and appears to show that he failed miserably in this position. (Tab B) In fact, according to the XO, the applicant had no operational duties at all during the evaluation period because he had been reassigned to purely administrative duties because of the reorganization. (Tabs N and W) On its face, therefore, the disputed OER is erroneous in this regard. Moreover, the applicant was reassigned to duties for which he had little to no training or experience (Tabs E and F), and it is not clear whether the applicant's supervisor took this lack of experience into account when evaluating his performance as the Logistics Officer. The supervisor, who was the XO of the EMSST, made no mention of such considerations in his affidavit regarding the disputed OER and explained only that because of the reorganization many officers at the EMSST served in positions to which they had not been assigned by the Personnel Command. (Tab N) Although the applicant apparently failed to meet the XO's expectations as the Logistics Officer, the Board finds that his assignment to a position for which he had no training or experience was unjust and renders the accuracy of the OER suspect.

8. The applicant alleged that the EMSST had no published rating chain, as required by Article 10.A.2.b.2.b. of the Personnel Manual, and that the XO of the EMSST served improperly as both his supervisor and reporting officer and thus was erroneously responsible for the entire disputed OER. (Tab P) The record shows that the XO had originally been assigned as the CO of the MSST and that the applicant was originally assigned as the OO of the MSST. (Tabs D and N) Under Article 10.A.2.e.1.e. of the Personnel Manual, a CO may serve as both the supervisor and reporting officer for personnel who report directly to them. Therefore, if the MSST had existed in 2006, the CO of the MSST could have properly served as both the supervisor and the reporting officer for the disputed OER. However, as the XO himself pointed out to the applicant in an email dated May 10, 2005 (before the evaluation period for the disputed OER even began), the "MSST does not exist." (Tab V) Their unit had been reorganized into an EMSST in 2004, and the XO was only the XO, not the CO, of the EMSST. The Board notes in this regard that the XO signed all of his emails as the XO (Tabs U, V, W, and X); that in December 2004, the CO of the EMSST—not the XO—endorsed the applicant's application to

¹⁰ See, e.g., BCMR Docket No. 2008-076.

the Commandant's Diversity Advisory Council (Tab T); and that in the fall of 2005 it was the CO of the EMSST, not the XO, who approved the applicant's subordinates' evaluations. (Tab W) The XO apparently continued to use the title of CO of the MSST after the demise of the MSST, but the XO was not the CO of the EMSST and therefore was not the applicant's CO at any time during the evaluation period for the disputed OER. Article 10.A.2.e.1.e. of the Personnel Manual does not authorize XOs to serve as both the supervisor and reporting officer for a subordinate. The preponderance of the evidence shows that the Coast Guard violated this regulation by allowing the XO of the EMSST to serve as both the supervisor and reporting officer for the disputed OER. (Tab B) The JAG did not respond to this allegation by the applicant, but the Board notes that the JAG has recommended relief many times in the past when officers have been evaluated by unpublished or improperly composed rating chains.¹¹

9. Having found that the Coast Guard violated Article 10.A.2.e.1.e. of the Personnel Manual by having the XO of the EMSST serve as both the supervisor and reporting officer for the disputed OER, the Board must decide whether this violation was prejudicial to the applicant. Normally, officers are evaluated by a rating chain of three different superior officers who have observed their performance.¹² Marks and comments are assigned by a supervisor and a reporting officer, and a reviewer reviews the OER and "[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential."¹³ In this case, a single officer, the XO, erroneously prepared the entire OER, and the officer who served as the reviewer stated in his affidavit that he had "very limited" contact with the applicant and concluded that the disputed OER was fair based on his telephone conversations with the XO. (Tab O)

10. The applicant alleged that the violation of Article 10.A.2.e.1.e. of the Personnel Manual was prejudicial to his OER because he had previously been assigned to the Headquarters planning office that was primarily responsible for the reorganization of the MSST/EMSST and, hence, for the XO's loss of his position as the CO of the MSST. He alleged that the XO complained about the applicant's assignment to the Personnel Command even before the applicant arrived at the unit and that the XO resented him because of his work at the Headquarters planning office responsible for his loss of command. In responding to the applicant's claims, the XO admitted that he had discussed the applicant's assignment to his unit with "multiple officers," and he did not deny that he had voiced his objections to the applicant's assignment to the unit to the Personnel Command before the assignment was finalized. (Tab N) Moreover, the applicant's allegations of prejudice are supported by an affidavit submitted by the Chief of the Headquarters planning office at issue. (Tab S) This captain stated that the applicant had worked in that office prior to his assignment to the EMSST, that the EMSST had a detrimental "command culture" and a poor "command climate," and that the applicant was "a principal casualty" of a "leadership gap" at the EMSST. More specifically, the captain stated that the EMSST command was "pre-disposed to distrust" the applicant because of his involvement in the planning of the reorganization. Therefore, in retrospect, it appears that the XO should have been disqualified from serving on the applicant's rating chain pursuant to Article 10.A.2.g.2.b. of the Personnel Manual. The Chief of the Headquarters planning office also noted that although the applicant, because of his work in the planning office, knew how the EMSST was supposed to

¹¹ See, e.g., BCMR Docket Nos. 2006-085, 2006-036, 2003-011, and 2002-101.

¹² PERSMAN, Art. 10.A.1.c.4.

¹³ PERSMAN, Art. 10.A.2.f.2.a.

function, he “was frankly working against a stacked deck; pre-disposed opinions by the command on how it should be formed and organized. Unfortunately for all involved, those ideas ran contrary to the vision outlined by Coast Guard Headquarters.” In addition, he noted that the command of the EMSST was later investigated because of the EMSST’s tardy development, failure to train members, and “numerous reported personnel problems.” (Tab S)

11. The applicant has proven by a preponderance of the evidence in the record that during the evaluation period for the disputed OER, he was assigned to administrative, finance, and logistics duties for which he had little to no experience or training; that he was erroneously evaluated by a single officer, the XO, in violation of the Personnel Manual; that the XO did not want him to be assigned to the unit and was predisposed to distrust and resent him; and that he ultimately received a derogatory OER that erroneously shows that his primary duty during the evaluation period was to be the AOO. Therefore, the Board finds that he has also proved by preponderance of the evidence that the disputed OER is erroneous and was negatively affected by a prejudicial violation of a regulation¹⁴ and so should be removed from his record and replaced with an OER prepared “for continuity purposes only.”¹⁵

12. The applicant voluntarily resigned from his active duty commission in June 2007 but is still a Reserve officer and has asked the Board to remove his failures of selection for promotion to lieutenant commander so that he will have two additional opportunities to compete for promotion with a corrected record. His Reserve OERs and affidavits from his superior officers in the Reserve show that he has performed exceptionally well in the Reserve. (Tabs E, K, and Y) The JAG opted not to address the applicant’s request to have his failures of selection for promotion removed. (Tab Z) When an applicant proves that his military record contained a prejudicial error or injustice when it was reviewed by a selection board, this Board must determine whether the applicant’s failure of selection should be removed by answering 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 [the applicant] would have been promoted in any event?”¹⁶ Under this *Engels* test, 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, despite the plaintiff’s *prima facie* case, there was no substantial nexus or connection” between the prejudicial error and the failure of selection.¹⁷ To void a failure of selection, the Board “need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded.”¹⁸

13. The disputed OER documenting the applicant’s removal from his duties at the EMSST is clearly derogatory and highly prejudicial as it labels him as a “marginal performer” with “limited potential” and states that he is “[n]ot recommended for promotion.” (Tab B) Therefore, it clearly prejudiced his record when it was reviewed by the LCDR selection boards.

¹⁴ *Hary*, 618 F.2d at 708.

¹⁵ 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. PERSMAN, Article 10.A.3.a.5.

¹⁶ *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005); *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

¹⁷ *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

¹⁸ *Engels*, 678 F.2d at 175.

Furthermore, the disputed OER contains the only negative marks in the applicant's record. (Tabs E, G, J, and K) Therefore, it is not unlikely that the applicant would have been selected for promotion had the disputed OER not been in his record when it was reviewed by the selection boards. Accordingly, under the *Engels* test, the Board finds that the applicant's failures of selection for promotion must be removed from his record.

14. The applicant made no request regarding backdating of his date of rank should he be selected for promotion in the future. Therefore, the Board will not address this matter.

15. Therefore, the applicant's record should be corrected by removing the disputed OER; replacing it with a continuity OER; and removing his failures of selection for promotion.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of LT xxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is granted as follows:

His officer evaluation report for the period June 1, 2005, through March 10, 2006, shall be removed from his record and replaced with one prepared "for continuity purposes only."

His failures of selection for promotion to LCDR since March 10, 2006, shall also be removed from his record.

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