

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-022

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 after receiving the applicant's completed application on November 6, 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 23, 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 his officer evaluation report (OER) for the period June 1, 2005, to June 5, 2006, and to replace it with one prepared for continuity purposes only (without numerical marks or comments). The OER is the second he received as an Engineering Officer in Training (EOIT) on a high endurance cutter. He also asked the Board to promote him to lieutenant commander (LCDR), to backdate his promotion to the date of rank he would have had if he had been selected for promotion in 2008, and to award him corresponding back pay and allowances.

The applicant stated that when he received the disputed OER, he did not agree with the marks and comments and therefore called the Personnel Command. However, someone in the Officer Personnel Management Branch told him that if he submitted an OER Reply, his rating chain would be able to enter six extra pages of comments about his performance in his record so he opted not to reply to the OER. He was also told that the OER was not bad enough to affect his chances of promotion for LCDR. However, this advice proved to be untrue since he failed of selection in 2008 and 2009. The applicant asked the Board to include his allegations to the Board in his record as an official reply to the disputed OER.

The applicant alleged that the OER as a whole is unfair because in entering their comments about his performance, his rating officers used the positive comments he submitted in his OER input but stripped them of pertinent facts and figures and misconstrued others "to render them generic and contradictory of the assigned marks." He also alleged that the OER is unfair

because “[n]ot once during this period did I receive supervision, frequent feedback or monthly counseling sessions as outlined in [paragraph 5.a.(2) of the EOIT Program manual].”

The applicant also challenged several specific comments in the disputed OER. For example, he stated that the disputed OER impermissibly comments on his performance outside of the evaluation period because it states that he “required 19 of 23 months to qualify Underway EOW” (Engineering Officer of the Watch), while the evaluation period lasted only a year. Moreover, he alleged, there were mitigating circumstances that delayed his qualification as underway EOW. He explained that two weeks after he reported aboard the cutter, he assumed the position of Damage Control Training Team (DCTT) Leader. Being the DCTT “consumed the remainder of [his] first deployment” with the cutter. When the cutter was at homeport, his position as the Auxiliary division officer “demanded the refurbishment of 40 auxiliary engineering systems.” During the cutter’s next deployment, the applicant was sent ashore to attend DCA school. Upon his return to the cutter, he was appointed to Assistant Engineering Officer (AEO). He noted that he is criticized in the disputed OER for not qualifying as an AEO, but “there is no such qualification; it is merely a collateral duty similar to the other four division officer billets.” In addition, because of his competence and maturity, he was appointed the investigating officer for two medical review boards and four cases resulting in non-judicial punishment. These duties “consumed [his] attention for the entire third deployment, as per the command’s desire.” The applicant stated that the duties that consumed his time in lieu of underway EOIT qualification during the first three deployments were documented in his first OER as an EOIT aboard the cutter. In addition, he alleged, when the cutter returned to home port after the third deployment and the Executive Officer (XO) and Engineering Officer (EO) were transferred, they told the new XO and EO of his “command support and dedication in lieu of EOIT qualification delinquency.”

The applicant stated that “the fourth deployment was very productive” because the EO requested his assignment as the Main Propulsion Assistant (MPA), and the applicant served successfully as the MPA for six months. However, “the fifth and sixth deployments, encompassing the remaining six months of [his] tour were impeded by major power plant casualties which prevented all engineering personnel from completing required PQS.” However, special “power plant transferring considerations” allowed seven of them to complete their qualifications.

The applicant also noted that the OER fails to show that he “stood watch on a daily basis, eight hours in the engine room divided by four hours on the bridge.” Yet he was accused of “routinely displaying lack of motivation and initiative” and “forsak[ing] personal help and assistance in qualifications.” The applicant explained that he “did not ask the EO for help in completing his EOIT PQS [performance qualification standards] anymore than I asked the CO for help to complete the Deck Watch Officer PQS.” However, he did ask qualified personnel for help in completing the 41 drawings and getting 601 signatures. Regarding the signatures, he explained that information about much of the engineering work “is not available in printed format,” so attaining PQS required “one-on-one instruction and performed proficiencies.”

Regarding the comment that he routinely took longer to attain qualifications than other officers, the applicant stated that during his tour of duty, there were six other junior officers and two warrant officers pursuing EOIT qualifications. None of them completed the PQS within the “normally” allotted time in accordance with paragraph 5.a. of the EOIT Program manual; one

requested an extension of his tour to complete the PQS; and three others were transferred to other units before completing the PQS, yet only he received negative marks and comments in his OER.

The applicant alleged that the comment that he was “removed from almost all collateral duties” during the evaluation period to pursue the EOIT PQS is untrue because he retained all of his collateral duties except DCTT leader until the last week of his tour of duty. He noted that he performed several time-consuming collateral duties throughout the evaluation period even though paragraph 5.a. of the EOIT Program manual states that “[d]ue to the demanding nature of this program, non-engineering collateral duties shall be minimized until completion of Part I.”

The applicant complained that the disputed OER calls him a “minimalistic speaker.” He alleged that this term is defined as someone “who favors restricting the functions and powers of a political organization or the achievement of a set of goals.” He stated that there is no evidence whatsoever for this claim about his viewpoint and that it should be removed from the OER.

The applicant noted that in his 22-year military career, he has “qualified in eight different communities and ... received 31 evaluation reports. All of these evaluation reports, with the exception of this one, clearly and repeatedly document [his] sustained loyalty, dedication, accountability, and performance of duties.” In support of his allegations, the applicant submitted copies of the four reports of investigation he prepared, two of which are dated March 10, 2005, and the other two are dated April 5, 2005, and April 21, 2005. He also submitted copies of two memoranda concerning crewmates’ fitness for duty and physical disability evaluations. As evidence of his progress in attaining his EOIT PQS, the applicant submitted fifteen record entries showing that while assigned to the cutter he completed the following courses and qualifications:

First OER period as EOIT	9/29/04	Engineering Throttle Watchstander
	11/4/04	Navy Shipboard Structural Fire Fighting
		Navy Damage Control Wet Trainer
	12/2/04	All PQS for Basic Damage Control
		All PQS for Flight Deck On-Scene Leader
	2/24/05	Damage Control Assistant
		Gas Free Engineer
	5/10/05	Engineering Security Watchstander
First day of second period	6/1/05	All PQS for Damage Control, which qualified him for these watchstations: Advanced Damage Control; Advanced Shipboard Fire Fighting (Structural); Chemical, Biological, and Radiological Defense; AFFF Station Operator; Investigator; Scene Leader; Repair Party Leader; Damage Control Training Team
Second OER period as EOIT	8/24/05	Generator Watchstander
	9/16/05	Machinery Watchstander
	9/17/05	Inport Engineering Officer of the Watch
	1/17/06	FEMA Introduction to the Incident Command System
		FEMA ICS for Single Resources and Initial Action Incidents
		FEMA National Incident Management System (NIMS), an Introduction
		FEMA National Response Plan (NRP), an Introduction
	3/17/06	Underway Engineering Officer of the Watch

The applicant also submitted copies of nineteen performance evaluations with excellent marks and several awards and qualifications that he received as a member of the Navy. In addition, he submitted copies of his OER input and the OERs he received as an EOIT, which are summarized below; his EOIT Notebook, showing the dates of his drawings and completion of PQS; and the EOIT program manual.

EOIT PROGRAM MANUAL

The EOIT program manual, COMDTINST M3502.11B, provides guidance for officers assigned to the program to train for duty as Engineer Officers. The program is generic for all cutters and is administered in conjunction with the EOW qualification process. Paragraph 5 of the manual states the following:

a. PART 1 – Practical Naval Engineering Watch Qualifications and Damage Control PQS should normally be completed within 6 months of reporting aboard. Assignment as EOIT is an officer's primary duty. Due to the demanding nature of this program, non-engineering collateral duty assignments shall be minimized until completion of Part 1. ...

(1) The EOIT shall:

(a) Actively pursue and complete the course of study outlined herein, and continuously seek feedback from the EO regarding progress.

(b) Establish and maintain an EOIT Notebook that documents the completion of Parts 1 – 7.

(c) Qualify as an EOW. Until qualified, the EOIT shall stand underway and inport watches with a qualified EOW as directed by the EO and the unit's break-in watch rotation standards. Watchstanding (learning by experience) is the backbone of the EOIT Program. As general guidance, an EOIT should stand break-in watches at least 2 days per week inport and optimize the time available to stand watches while underway.

(d) As directed by the EO, work as a member of the main propulsion, auxiliary, electrical, and damage control divisions.

(e) As directed by the EO, participate in engineering plant light-off, securing, and special evolutions until qualified as an EOW.

(2) The EO shall:

(a) Brief the Engineering Department on their role in the EOIT program. Solicit input from chief/senior petty officers regarding the EOIT's technical aptitude and interpersonal skills demonstrated while working closely with enlisted personnel.

(b) Actively supervise, instruct, and provide frequent feedback to the EOIT.

(c) Conduct counseling sessions at least once per month to review the EOIT's notebook and evaluate his/her progress.

b. PART 2 – DCA School. Completion of Part 1 is normally a prerequisite for attending DCA School. Officers shall not be assigned to the position of DCA without having successfully completed DCA School. ...

c. PART 3 – Naval Engineering Division Officer Fundamentals. The emphasis of Part 3 is to develop the knowledge and skills to serve in the capacity of an Engineering Department Division Officer and to sharpen EOW skills acquired in Part 1.

(1) The EOIT shall:

(a) Be assigned (at the EO's discretion) and serve in the capacity of an Engineering Department Division Officer.

(b) Serve as a member of the EOW watch rotation.

(c) Continue to seek feedback from the EO.

(2) The EO shall:

(a) Continue to supervise, instruct, and provide frequent feedback to the EOIT.

(b) Continue counseling sessions at least once per month to review the EOIT's notebook and evaluated his/her progress.

d. PART 4. – Deck Watch Officer (DWO) Training. Procedures for completing Part 4 are outlined in Chapter 6 of COMDTINST M2502.4E, Cutter Training and Qualification Manual.

(1) Parts 1-4 shall be completed during the EOIT's first afloat tour (18 – 24 months). Upon completion of Parts 1-4, the EO shall adequately document completion in the officer's OER stating his/her overall capabilities, interest, and engineering aptitude. ...

e. PART 5 – Naval Engineering Organization, Policy and Procedures. Part 5 may be completed during the initial afloat tour or follow-on tour. The EO shall properly document completion in the officer's OER and on Form CG-4082 Officer Educational Record.

f. PART 6 – Technical and Contracting Schools. Technical and contracting courses outlined in Part 6 shall be completed as required by the EOIT's follow-on tour Billet Description ...

SUMMARY OF THE RECORD

The applicant served as an enlisted member in the U.S. Navy for almost 15 years before accepting a commission in the Coast Guard Reserve on October 1, 2001. His initial assignment was to be a project manager at a LORAN support unit. On his three OERs in this position, he received increasingly good marks and was recommended for promotion “with his peers.”

The applicant was promoted to lieutenant on April 1, 2004, and integrated into the regular Coast Guard on April 23, 2004. He reported aboard the high endurance cutter as an EOIT on July 19, 2004. On his first OER for this tour of duty, dated May 31, 2005, the applicant's duties are listed as follows:

- Engineering Officer in Training (EOIT);
- Assistant Engineering Officer (AEO);
- Engineering department CASREP manager with responsibility for equipment casualty reports;
- Auxiliary division officer with responsibility for maintenance of all mechanical equipment outside of the engine room;
- Flight Deck On-Scene Leader;
- Damage Control Training Team (DCTT) leader;
- Aviation Training Team (ATT) member;
- Gas Free Engineer; and
- Command Intel Officer.

On this first OER, the applicant received ten marks of 5 and eight marks of 6 in the various performance categories,¹ many laudatory comments, a strong recommendation for promo-

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

tion, and a mark of 5 on the comparison scale, which means that in comparison with other lieutenants whom his reporting officer had known, he was an “[e]xcellent performer; give toughest, most challenging leadership assignments.” The comments in this OER include the following:

Exceptional performer; quickly ramped up on Engineer & DCTT duties. Displayed excellent skills in multi-tasking environment, expertly assumed Auxiliary Div Officer and Repair Locker Leader positions during Tailored Annual Cutter Training (TACT), first tour afloat & progressing toward watch qualifications. Insightfully assessed galley and medical ice machine projects ... creatively out-sourced ... Fleeted up to DCTT Leader; achieved superior results in execution of duties; revised and tailored DC drills, team members poised to train at all levels, every DC training requirement met or exceeded. Persistent & meticulous inspection identified 25 auxiliary engineering systems in a critical status that, coupled with reduced home port time, necessitated concise prioritizing and methodical tailoring of maintenance; forward progress ensued resulting in very successful early completion in amazing 39 days w/ additional 15 discrepancies identified/refurbished. Fleeted up to AEO; ... Articulate speaker & avid listener, very comfortable with any type & size audience ... Written work prolific and concise; superb/thorough NJP investigation showed excellent writing ability ... Excellent leader and supervisor. Consistently recognized and responded to needs of crew resulting in unsurpassed loyalty and dedication to work. Strong advocate for professional development; ... Superb results as DCTT Leader; instilled teamwork and unit cooperation, empowered training team ... Instrumental in numerous multi-division and dept projects ... dramatically enhanced crew comfort and esprit de corps. Adeptly provided technical assist to NESU maintenance team to immediately resolve imposing aft steering problem ... Highly conscientious efforts to ensure timely and appropriate recognition during marking period ... continued to surpass all expectations in his performance. Ambitious in all areas, routinely exhibits superior leadership practices beyond department and expert technical skills. Display of positive attitude/dedication has been an outstanding example of others. Confidently/easily stepped up to roles requiring greater responsibility. ... Exceptional leader; consistently displayed outstanding judgment, initiative & responsibility; actively sought ways to improve naval engineering/damage control knowledge by completing: Damage Control PQS, Eng Security Watch qual, Pipe Patching & Shoring trng, Fire Fighting trng, and Damage Control Assistance Course. Selected to be DCTT leader despite first tour afloat due to proven judgment – tremendous focus on key issues drew steady increase in DC drill scores ... professional competence and maturity lent credence to selection as Investigating Officer for 4 NJP Masts ... daily support for cmd is very evident. Volunt’d as Cmd Intel Officer in absence of assigned ofcr ... Extremely prof’l officer ... proven to be an exceptional ofcr and Engineer. A highly motivated prof’l that has sought greater responsibility and quickly responded to changing priorities in a positive manner ... Repeatedly demonstrated excel’t ldrship/mgmt skills, sound judgment & a genuine concern for others. Tremendous work ethic enabled him to excel in challenging posns as DCTT ldr and AEO despite short time afloat. ... Strongest recommendation for promotion w/ peers.

The applicant’s second annual OER as an EOIT is the disputed OER in this case and covers his service from June 1, 2005, to June 5, 2006. It is signed by a new Engineering Officer as the supervisor and a new Executive Officer as the reporting officer. The Commanding Officer of the cutter was the same. The applicant’s duties during this period are listed as follows:

- Engineering Officer in Training (EOIT);
- Command CASREP manager with responsibility for equipment casualty reports;
- Engineering special project officer, assisting EO in planning long-term maintenance;

“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.”

- Engineering budget administrator;
- Main Propulsion Assistant (MPA), responsible for maintenance and operation of all main propulsion and diesel generator systems;
- Flight Deck On-Scene Leader;
- Inport and Underway Engineer Officer of the Watch (EOW); and
- Aviation Training Team (ATT) member.

MARKS AND COMMENTS IN THE DISPUTED OER

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	5	Effectively coordinated scullery upgrade with CG Yard, overcame scheduling conflicts between ship's force and CG Yard technicians, helped to resolve configuration/install dilemmas; positive task intervention helped to alleviate contract delays. Utilized all avenues (USCG/USN/Contrator) to repair Glide Slope Indicator system and overcome supply system delays in time for Aviation Certification and Tailored Annual Cutter Training (TACT) periods. Assisted department with preparations for Shipboard-Helicopter Standardization Training (STAN); assisted Aviation Training Team (ATT) with fire party and crash on deck drills; training 100% effective, instilled confidence during execution of graded exercises. Achieved positive results in execution of CASREP management duties; implemented tracking matrix as directed; very few reports were submitted late or inaccurate. Demonstrated marginal performance with regards to EOIT requirements; slow to reach all target points, required 19 of 23 months to qualify as an underway Engineer Officer of the Watch and waited until end of tour to turn in EOIT PQS. Preferred to forsake personal help and assistance in qualifications and assigned tasking, resulting in overdue timelines & routinely displayed lack of motivation/initiative; had to be prompted to complete projects/quals. Even though he completed the minimum EOIT PQS, he did not receive an Assistant Engineer Officer (AEO) qualification.
3b	Using Resources	4	
3c	Results/ Effectiveness	4	
3d	Adaptability	4	
3e	Professional Competence	4	
4a	Speaking and Listening	4	Minimalistic speaker, very direct & clear to subordinates. Presented all hands brief concerning dry dock safety, covered all details clearly and concisely, made good use of MLC power plant slides to convey project initiatives. Proficient writer/proof-reader, authored and/or reviewed several CASREPs and page 7s, 2 CSMPs, 14 PO evals, 2 awards, 1 SOQ and SOY recommendation, ROTC Instructor and DCO letters of recommendation with minimal changes. Conducted very good/thorough NJP investigations with appropriate findings and recommendations.
4b	Writing	4	
5a	Looking Out for Others	5	Routinely displayed an understanding of balance between unit and crew needs. Comfortably interacted with subordinates at all hours to resolve issues, act as a sounding board, or encourage future success through advancement or promotions; sacrificed significant personal time counseling member to apply for commission, using personal experience to assist with the application process. Involved in many successful multi-division/cross-dept projects; including scullery upgrade, crew berthing area deck refurbishment, and Command Assessment of Readiness and Training (CART) checks; all of which greatly increased crew health, well-being and safety. As acting MPA for 3 months, partnered w/ MLC(vr) to tackle imposing maintenance and logistics issues afflicting ship's Power Take Off system and Main Reduction Gear bearing; restored both systems to designed specifications while maintaining operational readiness. Fully empowered CPO/LPOs with freedom to make decisions concerning divisional responsibilities without fear of reprisal; substantiated constant CPO/LPO interaction and professional development. Submitted evaluations early, of good quality w/ proper supporting documentation; 2 Pos promoted, prepared good Sailor of the Year package on short notice for deserving subordinate. Own OSF submitted in a timely manner.
5b	Developing Others	4	
5c	Directing Others	4	
5d	Teamwork	4	
5e	Workplace Climate	4	
5f	Evaluations	4	
6	Signature of the new EO as the applicant's supervisor, dated June 20, 2006		

7	Reporting Officer's Comments	NA	[Concur with supervisor's assessment] [The applicant] was removed from almost all collateral duties in order to allow him to concentrate on his engineering quals this period. He performed his duties in an extremely professional manner, but he routinely took much longer than necessary to do so and was surpassed by new JOs on board half as long. This OER reflects a significant change from his prior evaluation due to the time it took for him to complete assigned tasks & EOIT PQS stds. He has taken his entire tour to complete required PQS and failed to qualify as an EOW until the last week of his last patrol.
8a	Initiative	4	Assigned duties as the main Prop DivO for 3 mos. During absence of CWO incumbent, acquired true ownership and ensured all preventive and corrective maintenance was correctly performed and tracked. As an engineering watch stander, handled all watch procedures and engineering casualties calmly, took initial actions and provided accurate plant status and limitations info to OOD & EO; held subordinate watchstanders accountable to EO's standing orders. Fair and impartial NJP investigation led to immediate resolution; alertly ascertained conflicting evidence regarding enlisted member's performance; initial charges decreased, achieved proper outcome. Completed EOIT program including: advanced damage control PQS, inport and underway EOW qual, machinery watch qual, engineering throttle watch qual, deck watch officer (DWO) indoc. Routinely presented a positive attitude toward assignments & shipmates; ready to work long hours if needed. Displayed impeccable image with Detyens Shipyard team leaders as a primary inspector for availability work on sea strainers; ensured CG image was professional and proper. Continually displayed impeccable grooming and uniform standards. Maintained weight within CG standards.
8b	Judgment	4	
8c	Responsibility	4	
8d	Professional Presence	4	
8e	Health & Well-Being	4	
9	Comparison Scale	4	[In comparison with other lieutenants, he was rated a "[g]ood performer; give tough, challenging assignments.]
10	Potential	NA	[The applicant] has successfully completed his EOIT tour on [the cutter] and with more time and supervision, he can achieve the potential for greater leadership roles. Considering background & prior experience, I am confident [he] will do well in the performance of his C4I duties at MLCLANT (TS). With more experience, he will be ready for future positions of higher responsibility in the C4I community, or assignments in the intelligence community or in other technical fields. Promote with peers. Without further shipboard and engineering experience, he is not recommended for an Engineering Officer afloat billet.
11	Signature of the new XO as the applicant's reporting officer, dated June 22, 2006		
12	Signature of the CO as the reviewer, dated June 23, 2006		

After leaving the cutter, the applicant was assigned to maintain, install, and modify electronic systems, such as maritime and nationwide differential global positioning system sites and other aids to navigation. He received excellent OERs for this work with strong recommendations for promotion. However, the applicant failed twice of selection for promotion and so was retired as a lieutenant on June 30, 2010.

VIEWS OF THE COAST GUARD

On March 30, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case by redacting one comment from the disputed OER.

The JAG argued that the only error committed by the Coast Guard in the disputed OER is that the comment about the applicant requiring 19 of 23 months to qualify as Underway EOW is a comment, in part, about his performance outside of the evaluation period since the evaluation period was only 12 months long. The JAG admitted that comments about an officer's perfor-

mance outside of the evaluation period are not permitted in an OER.

The JAG argued that the evidence submitted by the applicant fails to prove that his rating chain violated their duty under the Officer Evaluation System to complete a fair and accurate performance evaluation. The JAG argued that the statements submitted by the applicant's rating officials, which are summarized below, show that they carried out their duties correctly, lawfully, and in good faith when evaluating his performance.

The JAG then argued that the applicant has "failed to show that the Coast Guard committed a legal error, making it logically impossible for him to make a prima facie showing of a substantial connection, or nexus, between the alleged errors and the Coast Guard's decision not to promote him. Under these circumstances, it is unnecessary to conduct an analysis under the second prong of *Engels* or for the Government to show harmlessness."

In recommending only redaction of one comment, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC). The PSC stated that the applicant's claims that he was not counseled about his performance are refuted by his rating officers. Moreover, the PSC stated, Article 10.A.2.c.2.b. states that officers "are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards."

The PSC stated that the applicant admits that he was slow to qualify as an underway EOW and noted that his rating officers acknowledged that he had collateral duties but still found that he should have completed his qualifications sooner.

The PSC noted that the applicant could have filed an OER Reply or sought correction of the disputed OER through the Personnel Records Review Board but did not do so. The PSC noted that the applicant also did not take advantage of his opportunity to submit letters to the selection boards before they convened. The PSC argued that there are no grounds for removing the applicant's failures of selection in 2008 and 2009 because his record contained no error that would have biased the decision of the boards. Therefore, the PSC recommended that the BCMR remove only the words "required 19 of 23 months" from the disputed OER and grant no other relief.

Statement of the EO, who was the Applicant's Supervisor

The EO stated that he has 29 years of Coast Guard experience and 19 years of sea time and became an officer after having been an enlisted member and a chief warrant officer. He alleged that the applicant "was given both positive feedback and negative counseling many times both in my stateroom and the XO's conference room during this marking period." The EO did not give the applicant formal, written counseling because he did not want to put such a negative entry in the applicant's permanent record.

The EO further stated that the applicant "waited until May 2006 to present me with his EOIT PQS book for signatures. The EOIT program is designed to be completed throughout the

2-year assignment and all EOITs were instructed to present me with their PQS at every qualification level, as most of the other EOITs successfully did. I would remind everyone at quarterly Division Officer/Division Chief meetings.”

Regarding the applicant’s collateral duties during the reporting period, the EO stated that the applicant’s “duties during the ‘refurbishment of 40 auxiliary engineering systems’ was that of a supervisor for the daily inspectors, a position most every EOIT has the opportunity to perform during a dockside or dry-dock availability. This does not require the undivided attention of a division officer as the auxiliary division on a [high endurance cutter] has a Chief Petty Officer, 2 First Class Petty Officers, and 8 junior personnel assigned.” The EO stated that the applicant’s duties during his entire tour of duty aboard the cutter were “no different than any other EOIT, and there are 5 [to] 6 EOITs on [a high endurance cutter] at any given time.” The EO stated that the applicant was “rotated through all the division officer and collaterals on a 4 – 6 month basis just as every other EOIT with the exception of DCA. I have no personal knowledge that he ever served as DCA on [the cutter].” He also stated that the applicant was not assigned any non-engineering related collateral duties and “his involvement was minimized to allow a more concentrated effort on his engineering qualifications.”

The EO also stated that the applicant stood the same engineering watches as other EOITs and completed his deck watch officer watchstanding requirements under the EOIT program manual within a single week, from February 21 to 28, 2005. “This is for a total of 6 watches, the minimum required for the EOIT program.”

The EO concurred with the applicant’s statement that there is no formal AEO qualification process but explained that it is “a position based on trust of the EO” and that the applicant, “by his qualifications and actions, or lack thereof, did not have my trust and confidence for this position.” The EO stated that he used the term “minimalistic speaker” to mean minimal or the smallest amount. In this regard, the EO explained that the applicant gave one lecture on shipyard safety and, in so doing, simply read a Powerpoint presentation the cutter had received from the MLCLANT word for word.

The EO stated that the applicant’s claims about his fellow EOITs require clarification. For example, the EOIT who requested a one-year extension ‘was a winter [Officer Candidate School] graduate and arrived in December 2004 or January 2005, completed all EOIT requirements within 14 months and only extended 1 year to get full Deck Watch Officer (DWO) qualified and become competitive for a 378 Weapons Officer billet and future WPB CO.” One of the two chief warrant officers in the EOIT program with the applicant injured his back and completed just one patrol before being transferred ashore. The second chief warrant officer in the EOIT program did not arrive on the cutter until February 2006. The EO stated that “[w]ith the exception of [the applicant], all EOITs assigned to [the cutter] during my tenure completed all of their engineering qualifications and EOIT PQS will within their allotted time.”

The EO stated that the marks and comments in the disputed OER are accurate. The applicant’s “understanding of engineering systems was well above average for an EOIT, but his performance and completion of PQS/qualifications were not. He was extremely methodical with assigned tasking, but could not comfortably complete two assignments at once. ... [He] per-

formed his duties as an average EOIT and was evaluated as an average EOIT within the scope of the OER criteria.”

Statement of the Executive Officer (XO), who served as the Reporting Officer

The XO stated that she does not concur with the applicant’s “versions of events and his characterization of his and others’ performance.” The XO stated that the disputed OER “was fair and, in fact, was rather generous. To this day, I would be hard pressed to tell you what he did on the ship other than the bare minimum. He was given ample opportunity to complete his PQS and qualification program and still took until the very end of his last patrol to do so. Contrary to his claims, he was counseled at least several times by the EO.” The XO stated that the comment about the applicant using 19 of 23 months to qualify as an underway EOW was included “not to refer to prior performance but rather to show that he had nearly 2 years to complete a qualification program and that it took him almost all of that time to qualify. As this was his primary duty, and finding nothing significant that legitimately impeded his ability to complete his qualifications, I felt this was an appropriate comment.” The EO stated that she knew about the investigations the applicant worked on during his first year aboard the cutter and the time he spent off the cutter and “found those items to be insufficient mitigating factors.”

The XO stated that the applicant’s claim that the other EOITs failed to complete their qualifications is inaccurate. She alleged that the applicant “was taking an excessive amount of time to complete a program that is routinely completed in a timely fashion by other officers, all of whom were junior to him and who had similar competing demands of other duties and watch-standing requirements, as well as having to learn how to be an officer. As an O-3 with extensive time in the military, [the applicant] should have been able to easily handle the demands of some basic collateral duties, division duties, and the qualification program.”

The XO stated that the “EOIT program is challenging, but not overwhelming, and there was sufficient time and assistance available for [the applicant] to complete the program much earlier. I evaluated him accordingly. As it was, he took so long (qualifying during the last week of his last patrol) that he did not contribute to the ship as a qualified EOW. ... Quite frankly, based on my observation and knowledge of his performance, I was unable to legitimately give him marks or comments higher than those that he received. As a LT with years of military experience, he should have been able to contribute at a much higher level but did not and barely performed at a basic level.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 19, 2010, the applicant responded to the views of the Coast Guard. He stated that he disagreed with the recommendation to grant only partial relief, but “loathly accept[s] it since the burden to provide cogent and clearly convincing evidence will be insuperably difficult. Considering the present Coast Guard retention climate for workforce management to reduce body-to-billet overages, it is apparent that positive consideration will not be awarded.”

SUMMARY OF THE OER REGULATIONS

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

Article 10.A.1.b.2. of the manual states that “[i]ndividual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards.”

Article 10.A.1.c.4. b. 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.4.c.4. of the manual provides the following instructions for Supervisors completing their section of an OER (similar instructions are provided for Reporting Officers in Article 10.A.4.c.7.):

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

c. Where the Supervisor has insufficient information to provide a mark or if observations are believed inadequate to render a judgment, the “not observed” circle shall be used. The reason for the “not observed” must be briefly stated in the “comments” blocks or Section 2.

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

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer’s performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

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

Article 10.A.4.c.8.a. states that on the comparison scale in an OER, a Reporting Officer “shall fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.

Article 10.A.4.f.11. prohibits a rating official from adding a comment to an OER that “[d]iscuss[es] Reported-on Officer’s performance or conduct which occurred outside the reporting period.”

Article 10.A.4.g. allows an officer to submit an OER Reply through his rating chain for inclusion in his record with the OER. The reply must be submitted within 21 days, and each member of the rating chain must forward it with either no comment or a single page of comments responding to the OER Reply.

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.²

3. The applicant asked the Board to expunge from his record his OER for the period June 1, 2005, to June 5, 2006, and also to expunge his failures of selection for promotion to lieutenant commander. 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.³ Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.⁴ 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.⁵

² 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”).

³ 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 prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ *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).

4. The applicant alleged that “[n]ot once during this period did I receive supervision, frequent feedback or monthly counseling sessions as outlined in [paragraph 5.a.(2) of the EOIT Program manual].” Although the EO apparently did not review the applicant’s EOIT notebook once per month and evaluate his progress—in fact the EO complained that the applicant failed to bring him his notebook for review, as the EO requested at quarterly meetings, until the last week of the evaluation period—it is clear from the statements of the EO and the XO that the applicant did receive a great deal of verbal feedback during the evaluation period. The Board finds that the applicant has not proved by a preponderance of the evidence that the disputed OER is unfair because of the alleged lack of feedback.

5. The applicant alleged that he had too many time-consuming collateral duties and had to perform too much watchstanding to complete the EOIT program in a timely manner. Paragraph 5.a. of the EOIT Program manual states that “[d]ue to the demanding nature of this program, non-engineering collateral duty assignments shall be minimized until completion of Part 1.” However, the collateral duties shown on the applicant’s OER all appear to be related to engineering, and the EO stated that the applicant received the same collateral duty assignments and watchstanding duties that other EOITs received and that the other EOITs, who were junior to the applicant, were able to complete the program in a timely manner with the same workload. The Board finds that the applicant has not proved that his workload was so heavy that his duties reasonably prevented him from completing his PQS as an underway EOW in a timely manner.

6. The applicant alleged that the statement in the disputed OER about taking 19 of 23 months aboard the cutter to qualify as underway EOW is impermissible because it comments on his performance outside of the evaluation period. He noted that the evaluation period for the disputed OER was only 12 months long. Article 10.A.4.f.11. of the Personnel Manual prohibits OER comments that concern an officer’s “performance or conduct which occurred outside the reporting period.” The disputed OER states that the applicant was “slow to reach all target points, required 19 of 23 months to qualify as an underway Engineer Officer of the Watch and waited until end of tour to turn in EOIT PQS.” The Board agrees with the applicant and the Coast Guard that the part of this comment that refers to him taking 19 of 23 months to qualify as an underway EOW is prohibited under Article 10.A.4.f.11. as it clearly characterizes his performance as slow during the prior evaluation period as well as the evaluation period for the disputed OER. Therefore, the Board will order the Coast Guard to remove the phrase “required 19 of 23 months to qualify as an underway Engineer Officer of the Watch” from the dispute OER so that the remaining comment shall read, “slow to reach all target points, [redaction] and waited until end of tour to turn in EOIT PQS.”

7. Although not challenged by the applicant, the Board notes that the reporting officer’s comment that “[h]e has taken his entire tour to complete required PQS and failed to qualify as an EOW until the last week of his last patrol” also violates Article 10.A.4.f.11. by referring to conduct and performance outside of the evaluation period for the disputed OER. Therefore, the phrase “taken his entire tour to complete required PQS and” should be removed from the OER so that the sentence will read, “He has [redaction] failed to qualify as an EOW until the last week of his last patrol.”

8. The applicant complained that his supervisor, the EO, called him a “minimalistic speaker.” He claimed that this phrase erroneously suggests that he favors restricting the functions and powers of political organizations and performance of duties.” According to Webster’s Dictionary, however, this is the definition of a “minimalist,” not a “minimalistic speaker.” Moreover, the Board finds that the phrase is unlikely to be misinterpreted by any reader to mean something else than what the EO intended to communicate—i.e., that the applicant had very little to say when he given the opportunity to speak to a group. The applicant has not proved by a preponderance of the evidence that this phrase is inaccurate, misleading, or unjust.

9. The applicant alleged that the comment that “he did not receive an Assistant Engineer Officer (AEO) qualification” is technically accurate but misleading because there is no formal AEO qualification process since the EO simply appoints one of the EOITs to be the AEO. The EO admitted that there is no formal qualification process but stated that the AEO position is one of trust and that the applicant “by his qualifications and actions, or lack thereof, did not have my trust and confidence for this position.” The applicant did not deny knowing that he was expected to attain qualifications and thus gain the EO’s trust so that he could serve as the AEO. Although there are no formal AEO qualifications, it is clear that gaining the appointment depended wholly on the EO’s trust, which would logically depend in large part upon an EOIT’s progress in attaining his PQS. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the comment is erroneous or unjust.

10. The applicant argued that the excellence of his other performance evaluations as an enlisted member of the Navy and junior officer in the Coast Guard prove that the disputed OER is erroneous and unjust. However, an OER covers only an officer’s performance during a specific period, and an officer’s performance can vary over time for a variety of reasons. The Board finds that the quality of the applicant’s other performance evaluations does not prove that the criticisms of his performance in the disputed OER, which contains comparatively mediocre but not negative marks, are erroneous or unjust.

11. The applicant asked the Board to include his allegations about the disputed OER in his record as an OER Reply. However, the applicant clearly was aware of the opportunity to submit a timely OER Reply within 21 days of his receipt of the disputed OER, pursuant to Article 10.A.4.g. of the Personnel Manual, and rejected that opportunity. Therefore, the Board finds no reason to include his allegations to the Board in his official record as an OER Reply.

12. The applicant has not proved that the disputed OER is an inaccurate or unfair assessment of his performance by the rating officials who were properly tasked to and had the best opportunity to evaluate his performance during the evaluation period. He has proved only that the phrases “required 19 of 23 months to qualify as an underway Engineer Officer of the Watch” and “taken his entire tour to complete require PQS and” are impermissible under Article 10.A.4.f.11. of the Personnel Manual and should be removed from the OER.

13. The applicant asked the Board to remove his failures of selection for promotion from his record so that he may remain on active duty and have additional opportunities to be promoted. When an applicant proves that his military record contained an error or injustice when it was reviewed by a selection board, this Board must determine whether the applicant’s

failures 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?”⁶ 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.⁷ 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.”⁸

14. The erroneous comments in this case—“required 19 of 23 months to qualify as an underway Engineer Officer of the Watch” and “taken his entire tour to complete required PQS and”—are negative comments but their inclusion in the OER does not make the OER worse than it would otherwise have been because many other comments in the OER contain substantially similar criticisms of his slowness to achieve required qualifications:

Demonstrated marginal performance with regards to EOIT requirements; slow to reach all target points, [erroneous comment redacted] and waited until end of tour to turn in EOIT PQS. Preferred to forsake personal help and assistance in qualifications and assigned tasking, resulting in overdue timelines & routinely displayed lack of motivation/initiative; had to be prompted to complete projects/quals.

[The applicant] was removed from almost all collateral duties in order to allow him to concentrate on his engineering quals this period. He performed his duties in an extremely professional manner, but he routinely took much longer than necessary to do so and was surpassed by new JOs on board half as long. This OER reflects a significant change from his prior evaluation due to the time it took for him to complete assigned tasks & EOIT PQS stds. He has [erroneous comment redacted] failed to qualify as an EOW until the last week of his last patrol.

Therefore, the Board finds that the erroneous comments did not prejudice the applicant’s record when it was reviewed by the selection boards. Thus, under the *Engels* test, there is no basis for removing the applicant’s failures of selection for promotion from his record.

15. Accordingly, the applicant is entitled only to partial relief in that the erroneous comments “required 19 of 23 months to qualify as an underway Engineer Officer of the Watch” and “taken his entire tour to complete required PQS and” shall be removed from the disputed OER. No other relief is warranted.

⁶ *Quinton v. United States*, 64 Fed. Cl. 118, 125 (2005); *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

⁷ *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.

⁸ *Engels*, 678 F.2d at 175.

ORDER

The application of LT xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is granted in part as follows:

The Coast Guard shall remove from his OER for the period June 1, 2005, to June 5, 2006, the following two phrases: “required 19 of 23 months to qualify as an underway Engineer Officer of the Watch,” which appears in block 3, and “taken his entire tour to complete required PQS and,” which appears in block 7.

No other relief is granted.
