

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2010-093**

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**FINAL DECISION**

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the completed application on February 3, 2010, 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 December 3, 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**

The applicant, a commander (CDR) in the regular Coast Guard, asked the Board to correct parts of his officer evaluation report (OER) for the period December 1, 2007, through June 27, 2008, or to expunge the OER from his record. The disputed OER was the fourth and final OER he received as the head of the Xxxxxx Department at a Xxxxxx Command. It includes mostly excellent performance marks assigned by the supervisor, CDR X, who was the Deputy Xxxxxx Commander, but one average mark of 4<sup>1</sup> for "Speaking and Listening" in block 4 supported by the comment that although a gifted speaker, he "[f]ailed to listen carefully for intended msgs/spken words fm Cmd, DXX(l), CGIS, etc, re sched events, pers'l cases, office moves, etc." In addition, the Xxxxxx Commander, CAPT X, who served as the reporting officer, assigned him three mediocre marks of 4 for "Judgment," "Responsibility," and "Professional Presence," a mark as a "Strong performer," in the third spot on the comparison scale,<sup>2</sup> and a mark of "Promotion Potential" on the promotion scale.<sup>3</sup> CAPT X concurred in the supervisor's marks and comments and supported the supervisor's and her own marks with the following comments:

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<sup>1</sup> On an OER, an officer is evaluated on a scale of 1 (worst) to 7 (best) in a variety of performance categories, such as "Planning and Preparedness," "Professional Competence," "Teamwork," "Initiative," and "Judgment."

<sup>2</sup> On the comparison scale, the reporting officer compares the officer with all others of the same rank whom the reporting officer has known throughout his career. There are seven possible marks ranging from the first, "Unsatisfactory performance/conduct; no potential for increased responsibility," to the seventh, "best officer of this grade." A mark in the third spot denotes a "Strong performer; very competent and respected professional."

<sup>3</sup> On the promotion scale, the marks range from "Do not promote" to "Accelerated promotion/in-zone reordering."

[block 7] Despite providing strong technical support to sub units & his external outreach efforts, [the applicant's] adaptability, listening skills, teamwork & respect for others is well below the level expected of a Xxxxx Xxxxxx Department Head & other O-5s I've observed. Despite being given repeated direction to keep Xxxxx Cmd/fellow Dept Heads informed of actions, events, issues, failed to do so on several occasions, impacting team efforts & workplace.

[block 8] ... Failed to make proper decisions, e.g., during renewed space allocation team analysis, moved xxxs offices despite direct & explicit guidance not [to] move any offices until (1) full proposal was complete, (2) cmd approved & (3) crew briefed. Initially blamed CWO. Failed to follow explicit instructions to deconflict Cmd Cdre/fellow Depart Heads calendars prior to sched of morale events in spite of unambiguous direction given repeatedly in various forums (dept hd mtg & one on one) & various formats (verbal e-mail, etc). sched morale event when 4 of the 5 Cmd Cadre could not attend including SNO; event had to be resch after announced, disrupting crew's plans. Cmd rep on public committees prior to loss of trust & confidence.

[block 9] ... Leadership & teamwork significantly below the majority of O-5s I've served with. Given straight forward & explicit instructions & failed to follow them. ... Lost confidence in abilities & withheld authority to (1) act as CO Mil Pers'l, (2) impose NJP, or (3) sign pers'l docs. Lost trust & removed as Xxxxx Rep on all outreach committees. Not recommended for O-6 promotion or positions of high visibility. Excellent candidate for any non-supervisory, technical MLC/CGHQ assignment.

Specifically, the applicant asked the Board to remove these comments; raise his mark for "Speaking and Listening" to a 5; raise his marks for "Judgment," "Responsibility," and "Professional Presence" to 6s; raise his comparison scale mark to the fifth spot, which denotes an "Exceptional performer; give toughest, most visible leadership assignments"; and raise his promotion scale mark to "Definitely promote." He also asked that he be awarded an appropriate end-of-tour award for his performance throughout his years at the Xxxxx.

### **SUMMARY OF THE APPLICANT'S ALLEGATIONS ABOUT THE OER**

In support of his request, the applicant submitted an affidavit and supporting documentation, including declarations signed by CDR X and CAPT X pursuant to his application to the Personnel Records Review Board (PRRB). His allegations about the disputed OER are intermingled in the affidavit with allegations about the declarations.

The applicant alleged that when CAPT X first arrived at the Xxxxx in late December 2007, their interactions were good. However, after he wrote a draft rebuttal, which he never sent, to an email sent by CAPT X to the District Chief of Staff on March 7, 2008, regarding the applicant's brief to her following an Area Budget Conference, everything wrong that happened at the Xxxxx was blamed on him. The applicant submitted copies of the two emails and his draft email, which, he alleged, changed CAPT X's attitude toward him:

(a) On March 7, 2008, CAPT X emailed the District Chief of Staff stating that she had received disturbing information from the applicant about furniture purchases. She stated that he had told her that that the Headquarters attitude was that, if a Xxxxx budget was "fat" enough to allow furniture purchases, that amount of money would be subtracted from your current and future years' budget. She stated that she hoped that common sense would prevail when she asked to purchase furniture for three new billets. In addition, she stated that the applicant had told her that Headquarters believed the Xxxxxs had "fat" in their budgets and intended to target it

to prevent a \$9 million shortfall. She noted that there was no “fat” in her Xxxxx budget and that she expected to be \$300,000 deficient in operating funds once the Xxxxx stopped “feeding” off a \$300,000 lawn contract for closed housing, and she did not know how the Xxxxx would “remain solvent and still run boats.”

(b) The Chief of Staff responded to this email the same day by advising her not to get “too spun up by comments” such as the applicant’s and by asking for the source of the applicant’s information. He said he would contact someone to learn more about the Xxxxx’s budget. CAPT X replied and stated that the applicant “did not know the name of the person who provided the brief” but stated it was someone from CG-82. She cc’ed her reply to the applicant.

(c) The applicant replied to himself the same day in a draft email denying that he had told CAPT X that he had heard at a recent brief that if a Xxxxx is “fat” and can buy furniture, the money would be taken away. He stated that this comment had been included in the brief the year before and was attributed to Headquarters, not the District. Also, he did not say “anything about taking equal funds in any instance except for folks who didn’t meet their spend down rates.” In addition, he stated that he did not attribute the possible plan to “tax” the Xxxxxs to meet the shortfall to any belief that the Xxxxxs had fat in their budgets. He “never said anything about fat at any time this morning and this was not about excess in budgets at all.” Regarding her comment about the \$300,000 lawn contract, he stated that it was “not correct either and I’m not sure who gave the CAPT that info. As we briefed in the Budget Brief, we use \$100K of a \$130K housing support fund from Hatteras to keep us afloat. It has been this way since we stood up the Xxxxx and will be that way until the housing goes away.”

The applicant alleged that he gave his draft email to CDR X so that he could decide how to handle the situation. In addition, he “queried the other Department Heads and the Deputy regarding its content. He, like the other DHs, agreed that the CAPTs email did not reflect what I said and that it could look bad for me to the Chief of Staff.” The applicant believes that CAPT X looked through the large pile of items on CDR X’s desk, saw the draft email, and considered it an assault on her character. Thereafter, she “became very cold and distant ... and there was no other reason for that to have happened.” Previously, she had complimented him on his performance and congratulated him on his selection for command.

With regard to the disputed OER, the applicant alleged that the reference to CGIS refers to an accusation that he mishandled an alleged rape case. He denied that he mishandled it and alleged that “while one issue was different from our normally followed procedure, it was authorized by the local CGI agent,” and that CAPT X knew it was authorized before she prepared the OER. In support of this allegation, the applicant submitted a copy of an email he sent to the Xxxxx Command Master Chief (CMC) on March 19, 2008, in which he wrote that a “XXX’s wife has been cleared by their attorney to talk to a member of the command prior to the wife giving a statement to CGI. I nor the Deputy or Captain can do it due to the legal issues. [The Special Agent] has agreed that the XXX’s wife can talk to you and then he will get a statement from you later about what is said as necessary. She would like to meet with you at 0900 tomorrow morning. Please advise ... .” The applicant also submitted a statement from a chief warrant officer (CWO), who wrote that he heard the applicant speaking on the telephone to a CGIS agent about a request from a XXX’s wife, who had accused another member of raping her, that she

speak to a representative of the command. The CWO stated that the impression he received from hearing the applicant's side of the conversation was that the CGIS agent agreed that the CMC could speak with the victim. However, the CGIS agent later called the command to complain about the meeting between the CMC and the victim having occurred. When CDR X came to the applicant's office to ask why the meeting had occurred, the CWO was present and told CDR X that, having overheard the applicant's end of the conversation with the CGIS agent, he believed that the CGIS agent had approved the meeting. On March 21, 2008, the applicant sent CDR X and CAPT X an email summarizing his notes regarding a meeting with them, which show that he had received new instructions about how to handle Page 7s for subordinates and that their future interactions with the Coast Guard Investigative Service (CGIS) would be handled by conference call and by emails cc'ed to the command cadre.

With regard to moving the xxx offices, the applicant stated that he did not authorize the move, did not know the directions CAPT X had given the teams about the potential moves, and was on leave when the move occurred, which CAPT X knew. In support of these allegations, he submitted an email he sent to several members on February 19, 2008, about their assignment to a working group tasked with studying space utilization at the Xxxxx and recommending "a best fit for all of the departments and divisions. ... CWO [S] will be leading up the group and you will be asked to present your proposal to the CAPT and Dept Heads at 1300 on 29 February." The applicant also submitted an email from the Xxxxx Engineering Officer dated April 15, 2008, in which the EO stated that the xxx shop had traded spaces with another group in early March, after several months of discussions and negotiations, to improve communications between the three major engineering divisions and that the move had greatly enhanced his department's efficiency. In addition, Mr. X of the xxx shop sent the EO an email on April 15, 2008, stating that he had collaborated with the EO on the move for several months and that the EO had told him in late February that they could move the office "whenever we could work it out and that the shop could move after the new shed was built." Therefore, the move occurred on March 3, 2008. Neither the EO nor Mr. X made any comment about the applicant's knowledge of or involvement with the move.

With regard to scheduling morale events, the applicant stated that the Morale Committee was not his responsibility; that he passed the proposed dates for morale events on March 11 and April 11, 2008, to his supervisor, CDR X, and to CAPT X's administrative assistant at a meeting of Department Heads on February 27, 2008; and that CAPT X learned he had done so before she prepared the disputed OER. He alleged that the assistant checked the command calendar during the meeting and did not state that there was any problem with the planned dates. However, in April he learned that CAPT X kept a separate, personal calendar that the assistant should have checked but did not. He alleged that only the April 11, 2008, event was at issue; that he had announced the planned date for that event at the meeting on February 27, 2008; that the date was changed to April 25th when CAPT X pointed out her conflict; and that she did not show up on April 25th anyway. He alleged that he was unjustly blamed for the scheduling conflicts on April 11th even though he was not the Morale Officer and both CDR X and CAPT X's assistant attended the meeting where he announced the planned dates of the morale events. He alleged that it was up to the Morale Officer, not the applicant, to check with CAPT X's assistant and the command calendar to ensure there were no scheduling conflicts with the selected dates. Moreover, he alleged, he kept the command cadre informed "on all manner of items throughout the

period, even those not within my department.” Therefore, he argued, all of the derogatory comments in block 7 of the disputed OER are unfounded. In support of his allegations about the scheduling of the Morale events, the applicant submitted the following:

- The applicant submitted a page out of the Xxxxx’s Standard Operating Procedures, which shows that it is the duty of the Administration/Personnel Division to maintain the Xxxxx Collateral Duty Instruction and to manage the Xxxxx Wellness and Physical Fitness Programs.
- On February 27, 2008, the applicant emailed the Morale Officer and Morale Committee members noting that CAPT X had requested a calendar of events. The applicant asked for their plans for the next three months. He stated that “[t]he only planned events I know of right now are the sports days on the second Tuesday of each month (subject to change if necessary). I think I recall soccer is scheduled for March, let’s do softball with a picnic at the park in April (11th?) (this can be combined with morale for funding) and kickball again in May if that is OK with you and the committees. Would it be possible for a spring trip to Xxxx Gardens around the 23rd of May? This is not direction by any means, just food for thought/suggestions. Please advise on your ideas.”
- On March 27, 2008, the applicant sent CDR X and CAPT X an email stating that “[a]s passed, the current plan is to hold a softball morale/sports day on Friday the 11th of April.” CAPT X replied that the chosen date “is in direct defiance of my explicit e-mail requiring all dates be de-conflicted with my calendar first. April 11 has been booked for at least 2 months on my calendar. Please provide the Deputy with the morale committee notes/emails where this date was announced.”
- On March 28, 2008, the applicant replied that the information about the April 11th sports day was passed at the Department Head meeting on February 27 because he was trying to follow her order to keep her informed of such matters three months in advance. He had thought that her administrative assistant, who attended that meeting, would ensure that there were no conflicts with the command calendar and would pass the information to her. He noted that the administrative assistant had once left the meeting “to get the calendar to ensure she had it to get everything down” and that the administrative assistant had written down the date and did not state that there were any conflicts. However, he had just learned that the event was never entered on the command calendar. He noted that the date could still be changed and that he would contact the Morale Committee, her administrative assistant, and CDR X “to ensure that there are no conflicts and find a date that you, the Deputy and as many of the cadre can attend and have the Morale Committee reschedule it for that date.”
- The Xxxxx CMC responded to this email, asking the applicant if he was alright and stating that she hoped that an email she had written about scheduling conflicts had not thrown him or anyone else “under the bus.”
- On April 7, 2008, CAPT X gave the applicant an administrative letter of censure, which does not appear in an officer’s record. The letter states the following:

1. Your performance over the past several weeks has been significantly below the level of that expected of a Xxxxx Xxxxxx Department Head and a Commander in the United States Coast Guard.

2. On Friday, March 21, 2008, I counseled you verbally on deficiencies in your performance and my expectations for the future. I specifically directed you to keep the Deputy and I informed on all matters that related to this Command, especially if you were going to take actions that countered any of my explicit instructions. You were present at the Department head meeting where I directed that all-hands events must be cleared through my calendar in advance and all Department Heads informed prior to scheduling to allow maximum participation by the senior officers in the command. Despite these specific instructions, you forwarded an email on Friday, March 28th that indicated an all hands' morale/sports day had been scheduled for 11 April even though I had a previous commitment listed on my calendar. Other members of the command cadre also had previous commitments that day.

3. This latest incident reflects a continuing pattern of repeated failures to keep me, the Deputy Xxxxx Commander, and fellow Department Heads appropriately informed of important events. Your actions reflect poorly on your performance of duty, communications, judgment, leadership, and professionalism as a Department Head and as a senior officer in the United States Coast Guard. I expect more from my senior staff. I encourage you to take stock of your actions, and make positive steps to ensure these performance deficiencies are not repeated in the future.

4. You shall operate your Department to provide full and open communications with me, the Deputy Xxxxx Commander, and other Department Heads. You shall immediately inform the appropriate Department Head of any information that affects that Department, any subordinate units, or Department personnel, and provide updates on issues as they develop. I expect you to use sound judgment in determining items that must be raised to the Command level, and those that may be resolved at the Department Head level. If you are in doubt about whether or not a matter requires my personal attention, you shall inform the Deputy Xxxxx Commander and follow his direction.

- CDR Y, the Xxxxxx Department Head at the Xxxxx, stated that at the Department Head meeting on February 27, 2008, CAPT X was absent, but CDR X was present. At the meeting, the applicant announced the dates for the next three morale events, including a March 11th soccer event, an April 11th softball event, and a Xxxx Gardens trip scheduled for either May 16th or 23rd. CDR Y stated that he noted down the dates to avoid scheduling work for his subordinates on those days. CAPT X's administrative assistant was taking notes, and CDR X told the assistant to check CAPT X's calendar to ensure she had no conflict with those dates. However, in early April, CDR Y stated, he heard about a conflict between the applicant and CAPT X because she had a conflict with the April 11th morale event. He then went on leave for a couple of weeks but upon his return, he offered CDR X his notes of the February 27th meeting to show that the applicant had indeed briefed the April 11th date at the meeting, but CDR X stated that it was not necessary. In support of his allegations, CDR Y submitted a copy of his notes of the February 27th meeting, which show the planned dates for the three morale events.

The applicant alleged that he was told that "as long as nothing else happened before I transferred, the issues discussed in the Letter of Censure would not be held against me in my OER," but they were.

In addition, the applicant alleged that CAPT X unjustly removed him from his duties as Commanding Officer (CO) of Military Personnel based on an erroneous perception that he was presenting himself as the CO in the community. The letter about his removal from these duties, also dated April 7, 2008, states the following:

1. Reference (a) designated the Xxxxxx Department Head of Xxxxx ... as the Commanding Officer of Military Personnel for Xxxxx .... As your superior commander, I am withholding your authority to act as Commanding Officer of Military Personnel effective immediately. Until further notice, you may not impose non-judicial punishment, sign documents as Commanding Officer of Military Personnel, or use the title of Commanding Officer of Military Personnel.
2. Additionally, I have concerns that your use of the title "Commanding Officer of Military Personnel" or similar terms has led to confusion over your status. Therefore, to reduce the possibility for confusion in the future, you are directed to not identify yourself as a commanding officer when dealing with members of the public or other military organizations. You may not serve as the official representative of the Coast Guard or Xxxxx ... at any community event, military function, meeting, or ceremony without specific prior approval from me or the Deputy Xxxxx Commander. You are directed to forward all official invitations sent to you for military or community events to the front office unless clearly extended to you in your personal rather than official capacity. You shall immediately cease all participation on the Military Advisory Committee and refer any requests or questions about MAC activities to the Deputy Xxxxx Commander or designated Xxxxx Representative to the MAC.
3. Your remaining duties and responsibilities as Xxxxxx Department Head are not affected by this action. You shall continue to prepare and review xxxxxx related documents, reports, and personnel matters, and coordinate as appropriate with other Department Heads. You shall forward signature-ready packages to the Deputy Xxxxx Commander for his or my action as appropriate.

The applicant stated that the prior Xxxxx Commander had designated him as the "Base CO" for 18 months, but "the parking space had been painted over, the office nameplate removed, and I scratched it off of my calling cards. ... [The prior Xxxxx Commander] didn't want to have to deal with the local base issues with all he had to do ... When [CDR X] reported aboard, he asked [the prior Xxxxx Commander] to change it to ensure there was no confusion about our statuses in the community and it was changed without event." The applicant stated that, contrary to CAPT X's perception, he did not claim to be the Xxxxx CO or use the title "Base CO" after it ended and he did not contribute to any confusion in the community about his title. "All of the administrative procedures as CO of MILPERS were conducted flawlessly as had been the case in the past. My judgment was never questioned by the CAPT or anyone else regarding mast proceedings." The applicant alleged that he committed no violations that warranted his relief as CO of Military Personnel and that the only reasonable justification available was a personality conflict between him and CAPT X. He alleged that CAPT X's misperception was based on invitations he received during the evaluation period as a paying member of the Military Affairs Committee (MAC) of the county's Chamber of Commerce. In support of these allegations, the applicant submitted the following:

- On March 21, 2008, the applicant forwarded to CAPT X an emailed invitation to a change of command ceremony from a Marine Corps unit on April 11th. He wrote, "I have gone to these in the past, but wanted to info you in case you would like to or would like the Deputy to be your representative. Please advise." In response, she asked him to forward all such invitations to her and stated that she or CDR X would normally attend

and that they would solicit a representative when they could not attend. On March 24th, the applicant replied and asked who would be attending so that he could let the sender of the email know. Her administrative assistant replied, stating that CAPT X had stated that the applicant should attend the event but that the administrative assistant should reply to the email for him as the voice of the front office for special invitations. The applicant agreed to go, and CAPT X thanked him.

- On March 25, 2008, the applicant sent an email to the District command, stating that he had received an invitation to the District change-of-command ceremony and was asked to find out if it was a personal invitation for him. The District Chief of Staff responded that “[i]nvitations were sent to all incoming COs as a courtesy, but no expectations or requirements to attend. You are certainly welcome, but please know that there won’t be a head count.”
- On April 28, 2008, the Marine Corps sent the applicant another invitation to a change-of-command ceremony scheduled for May 23, 2008. The applicant forwarded it to CDR X, CAPT X, and CAPT X’s assistant. On May 2, 2008, CAPT X replied, stating that in light of their detailed discussions regarding his being incorrectly addressed as the Xxxxx CO, she assumed that he was “ACTIVELY ensuring [he] was correcting those members of the community; AND actively removing your name from any and all of these lists.” The applicant replied that he “will take this for action first thing Monday morning. The invites may be due to me and the Master Chief being paying members of the MAC ... but I have told them and will follow up again to ensure there are no further problems. The Master Chief will attest I have not attended any MAC functions since I was directed not to.” CAPT X replied that “per the April letter, you should terminate your MAC participation if [you] have not already done so. Your termination should serve to reroute the emails to the proper Xxxxx POC.” On May 5, 2008, the applicant sent CDR X an email stating that he had called the MAC chairman to ensure that his name would be removed from “any MAC member email bang lists ... I want to clarify that to the best of my knowledge, they never thought I was the CO of anything only the rep for the Xxxxx and the Admin boy as I jokingly told them on many occasions. ... All of these folks have met both CAPT’s and you so I’m not sure where the confusion came in. ... I have not violated the Letter of Censure the CAPT gave me or the Withholding of the CO of MILPERS letter in any way and will not do so as my only intention for this entire three years was to do my job to the best of my ability and to help others as I could.”

With regard to CAPT X’s criticism of his leadership in the disputed OER, the applicant noted that she had appointed him to mentor a GS-11 from the Marine Corps despite the fact that he “had the largest workload of any Department in the Xxxxx” and was the most junior CDR at the Xxxxx. He also noted that he was asked to stand in as the Acting Deputy several times when CDR X was absent, including the final two weeks of the evaluation period. In support of these allegations, the applicant submitted an email dated February 6, 2008, in which CAPT X’s assistant sent an employee of the Marine Corps stating that the applicant, an outstanding officer, would be her assignment officer, supervisor, and mentor during her 60-day rotation at the Xxxxx.

The applicant denied having been counseled about any problems regarding his alleged failure to listen to the advice of the District's legal officers. He noted that he had worked for many senior officers, including flag rank officers, during his career and had "never had any problems picking up intended messages nor understanding spoken words."

Regarding CAPT X's comments in the OER that his adaptability and teamwork were below the level expected of a CDR, he noted that the comments are inconsistent with the marks of 5 he received from CDR X for these performance categories since a mark of 4 denotes the expected level of performance. The applicant alleged that because CDR X assigned him above-standard marks of 5 in these categories, CAPT X should not have included these negative comments. The applicant noted that all of the negative comments in the disputed OER correspond to marks of 4 or higher and so, he argued, they should all be removed since a marks of 4 and 5 are not below-standard marks and do "not rate a negative comment."

The applicant alleged that his supervisor, CDR X, "was influenced to change his position regarding the OER after it was questioned by the District Chief of Staff." He noted that while CDR X has denied being directed to change his marks or comments in the OER, he did not state whether he felt influenced to do so. He alleged that both CDR X and CAPT X's assistant told him that CDR X had gone to CAPT X "on several occasions to get her to give me the higher marks I deserved." In support of this allegation, the applicant submitted an unsigned draft of the disputed OER, which includes CAPT X's mediocre marks and negative comments but does not contain any negative comments by CDR X in the supervisor's section and includes a mark of 5 for the category "Speaking and Listening," instead of the mark of 4 ultimately assigned.

Regarding his request for a medal, the applicant alleged that CDR X asked him to provide input for a Meritorious Service Medal (MSM), which is higher than a Commendation Medal. At his check-out interview, CAPT X stated that although she could have given him an award for his accomplishments, she did not do so because the last line of an award citation states that the officer has "upheld the highest tradition of the United States Coast Guard" and she did not believe he had done so but she would not justify this claim. He alleged that her decision was based on her "misperceptions and her self-described personality conflict." In support of these allegations, the applicant submitted an email dated March 3, 2008, in which he sent CDR X input for an end-of-tour award since he was transferring in the summer, a deadline for such input had been announced, and he was going to be out most of the week. CDR X thanked him for the input and stated, "That is exactly what I needed." On March 24, 2008, after he sent another email about his award, CAPT X noted that CDR X had "the lead on this issue."

The applicant also submitted other documents to support his allegation that he was treated unfairly and that, although he kept his supervisor CDR X informed, his supervisor did not pass information timely to CAPT X:

- On January 14, 2008, the prior Xxxxx Commander sent the applicant a draft of the applicant's prior OER, asked him to review it, and stated, "You are without a doubt a superstar, and I'm thankful to have served with you."

- On March 11, 2008, the prior Xxxxx Commander sent the applicant an email stating that while agonizing over some personnel, finance, administrative, and xxxxxx work, he acquired “a full appreciation for all you did for me. Thanks for doing it so well.”
- On March 21, 2008, CDR X forwarded to the applicant an email from CAPT X in which she had asked CDR X on March 5, 2008, to initiate an audit of the Xxxxx’s government vehicle usage. CDR X stated, “Whoops, here is a tasker I forgot to act on! Please have Engineering complete a GV audit as detailed below.”
- On March 24, 2008, CAPT X sent the applicant a reply email stating she had not been briefed on a matter that CDR X had been handling concerning the command’s endorsement of a member for a possible overseas assignment. She asked if the matter had to be resolved by March 27th when CDR X would return. The applicant forwarded her email to CDR X, who replied on March 28th, asking the applicant to bring him the paperwork. The applicant then forwarded this email to himself with the comment that the paperwork “was on his desk in the middle of all of the piles of stuff, not the first time this has happened and when I told him it was on his desk, he was visibly upset and said he didn’t have it, until we found it and then of course no apology ...”
- On April 11, 2008, the applicant sent CDR X an email updating him on several disciplinary matters and pending discharges and requesting guidance. On April 28, 2008, the applicant sent him another email asking again for guidance on four of the same matters. CDR X replied, stating that they would meet with CAPT X the next day to address those matters and any others that were pending. CDR X noted that he and CAPT X had been “operating via TREO out of a gov/t vehicle, Emergency Management spaces and hotel rooms the last couple of weeks, so these things have not been resolved. It’s good to be back in the office and it’s good to have you back.”
- Also on April 11, 2008, the applicant sent CDR X an email asking if he approved the appointment of a housing management assistant. On April 28, 2008, the applicant re-sent CDR X the email asking if he had approved the matter. CDR X replied the same day, stating that he could not recall having approved it before, but that it did meet with his approval. He apologized for the delay.
- On April 25, 2008, a senior chief petty officer sent the applicant an informational email about a mast that would be held for a senior petty officer accused of insubordination. The applicant forwarded it to CDR X, who thanked him for keeping him “in the loop.”
- On August 7, 2008, the CDR who took over as Xxxxxx Department Head upon the applicant’s departure stated that the department “was in good shape when I took over for [the applicant].”
- Another CDR stated that she has served with the applicant for two two-year tours of duty and that she never heard him use profane language at any time to superiors, peers, or subordinates on or off duty. She also stated that while Acting CO of military personnel at the Xxxxx in the summer of 2006, the applicant had authorized some awards after the

CAPT told him that he could do so. At the time, the “Xxxxx construct was still very new and there [were] several role clarity issues” to work through.

### **SUMMARY OF THE RECORD**

On July 7, 2005, the applicant reported to the Xxxxx as a lieutenant commander to serve as the Xxxxxx Department Head. On his first OER in this position, dated April 30, 2006, which was his last OER as a lieutenant commander, his supervisor, the prior Deputy Xxxxx Commander, assigned him six marks of 7 and seven marks of 6 in the various performance categories. His reporting officer, the prior Xxxxx Commander, assigned him three marks of 7 and two marks of 6 in the performance categories and a mark of “Strongly recommended for accelerated promotion” in the sixth spot on the comparison scale.<sup>4</sup> The applicant was promoted to CDR on October 1, 2006.

The applicant’s second OER as the Xxxxxx Department Head, dated March 31, 2007, was his first as a CDR and was prepared by the new Deputy Xxxxx Commander, CDR X, serving as his supervisor and by the prior Xxxxx Commander as his reporting officer. CDR X assigned him five marks of 7 and eight marks of 6 in the performance categories. The prior Xxxxx Commander assigned him three marks of 7 and two marks of 6 in the performance categories, a mark of “One of the few Distinguished performers” in the sixth spot on the revised comparison scale and a mark of “Recently promoted to O-5” on the promotion scale.<sup>5</sup> The Xxxxx Commander included a strong recommendation for promotion to O-6 and for command positions in his written comments. In late 2007, the applicant was selected and assigned to command a Naval Engineering Support Unit upon his scheduled departure from the Xxxxx in June 2008.

The applicant’s third OER as the Xxxxxx Department Head, dated December 20, 2007, was required due to the change of command and the departure of his reporting officer, the Xxxxx Commander. CDR X assigned the applicant four marks of 7 and nine marks of 6 in the performance categories, while the departing Xxxxx Commander assigned him four marks of 7 and one mark of 6 in the performance categories, a mark of “One of the few Distinguished performers” in the sixth spot on the revised comparison scale, and a promotion scale mark of “Accelerated Promotion/In-Zone Reordering.”

On December 21, 2007, CAPT X took command of the Xxxxx. On April 7, 2008, CAPT X gave the applicant the administrative letter of censure and withheld his authority to act as Commanding Officer for Military Personnel as quoted on pages 5 and 6, above. Such letters are not entered in the officer’s record.

The disputed OER covers the applicant’s service from CAPT X’s arrival at the Xxxxx on December 21, 2007, through the applicant’s end of tour on June 27, 2008. His supervisor, CDR X, assigned him four marks of 7, five marks of 6, three marks of 5 for “Adaptability,” “Team-

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<sup>4</sup> See footnote 1 for an explanation of OER marks.

<sup>5</sup> The new promotion scale has four possible qualitative marks of “Do Not Promote,” “Promotion Potential,” “Definitely Promote,” and “Accelerated Promotion/In-Zone Reordering,” and two alternative, non-qualitative marks of “Recently Promoted to O-5” and “Already Selected [for promotion] to O-6.”

work,” and “Workplace Climate,” and an average mark of 4 for “Speaking and Listening,” supported by the comment that although a gifted speaker, he “[f]ailed to listen carefully for intended msgs/spken words fm Cmd DXX(1), CGIS, etc, re sched events, pers’l cases, office moves, etc.” His reporting officer, CAPT X, assigned him two marks of 5 for “Initiative” and “Health and Well-Being”; three marks of 4 for “Judgment,” “Responsibility,” and “Professional Presence”; a mark of “Strong performer, very competent and respected professional” in the third spot on the comparison scale; and a promotion scale mark of “Promotion Potential.” These marks were supported by the comments quoted on page 2, above. No end-of-tour medal was attached to the OER.

On July 7, 2008, the applicant assumed command of a Naval Engineering Support Unit. On his first OER in this position, he received four marks of 7, eleven marks of 6, and three marks of 5 in the performance categories, a mark of “Exceptional performer, give toughest and most visible leadership assignments” in the fifth spot on the comparison scale, and a promotion scale mark of “Definitely Promote.”

### **PERSONNEL RECORDS REVIEW BOARD**

The applicant contested the disputed OER by applying to the Personnel Records Review Board (PRRB), which apparently denied his request to correct or expunge the disputed OER, although no copy of the PRRB’s decision is in the record before the board. However, the applicant submitted some declarations and other evidence that were gathered for the PRRB.

#### ***Declaration of CAPT X, the Xxxxx Commander, for the PRRB***

CAPT X alleged that the disputed OER was a “fair and accurate reflection of [the applicant’s] performance during that marking period and should be retained in its entirety. Nothing contained within the application compels me to reconsider any mark or comment.” With regard to the applicant’s claim that she had changed or required CDR X to change any part of his section of the OER, CAPT X denied this claim. She stated that after she submitted the OER to the reviewer, the District Chief of Staff, he returned the OER, “noting inconsistencies between the ‘Communications Skills’ in block 4 and ‘Personal and Professional Qualities’ in block 8 (e.g. ‘failed to follow explicit instruction’, etc). At no time did [the reviewer] or I direct or require [CDR X] to change a mark or comment.”

CAPT X denied the applicant’s claim to the PRRB that she had ordered him to write his own OER. She stated that she specifically told all of the department heads that supervisors had to write the OERs for their subordinates.

CAPT X denied the applicant’s claim to the PRRB that during his meeting with CAPT X on March 21, 2008, he “found it very difficult to hear any intended messages when [CAPT X] used extremely foul language, as she called her ‘Boatswain’s Mate language’ when relaying her expectations to me during our meeting.” CAPT X stated that she could “not recall using foul language that could be considered either ‘extremely foul’ or ‘Boatswain’s Mate language’ to a reasonable person’s standard.” She stated that during her career she had, “on occasion, been upset enough about something to curse,” but she denied using profanity commonly.

CAPT X denied the applicant's claim to the PRRB that she had implied that he spoke effeminately. She stated that because she was baffled by this claim, she asked some of the department heads if they could recall her saying such a thing, and no one could recall it. However, the Xxxxx staff viewed a video about communication styles, which noted that some people will send an email with the "bottom line up front" and fill in details afterward if they are requested while others "tell the whole story." The video noted that women typically "tell the whole story" ending with their conclusions, while men more often give the "bottom line up front." The video does not state that one style is better than another. During the discussion of the video, she thinks she compared and contrasted they styles by noting examples and, given the applicant's accusation, she "assume[s] that he must have 'told the whole story' in a brief given that day that [she] used as an example of that particular style." She concluded by telling them that that the Xxxxx was adopting a hybrid style, in that they should put the "bottom line up front" and follow it by telling the "whole story." She told the PRRB that she had queried members who had seen the video that day and they all denied that she had ever implied that the applicant or anyone else spoke effeminately.

CAPT X denied the applicant's claim to the PRRB that he had been evaluated on a duty outside the scope of his duties because he was not responsible for the Morale Committee. She stated that the applicant's "duties included supervising the Morale Committee and its events." She noted that the Xxxxx Organizational Manual, COMDTINST M5401.6, states in several places that the Xxxxxx Department Head is responsible for managing and overseeing the Morale, Well-Being, and Recreation programs. She stated that her Xxxxx Standard Operating Procedures were still in draft form but were nearly identical to the COMDTINST and that the applicant himself had submitted the draft section for Xxxxxx. She noted that the Morale Officer stated that his chain of command for scheduling Morale events was the applicant, who signed almost all Morale documents at the Xxxxx, including the designation of the Morale Officer and the quarterly Morale budgets. She also noted that at Department Head meetings, either the applicant or his representative from the Xxxxxx Department passed information on Morale events.

CAPT X denied the applicant's claim that he was not responsible for scheduling the Morale event of April 11, 2008. She stated that the Unit Health Promotion Coordinator, yn2 x, has confirmed that all the events were coordinated and approved by the applicant. She alleged that on February 15, 2008, she had had a detailed discussion with the Department Heads about coordinating calendars for events to ensure maximum participation by leadership, and that she followed this discussion up with an email about "the need to notify the Command Cadre early to ensure conflicts are resolved before a date is 'approved' and announced to the crew." She denied the applicant's claim that the event had been scheduled in February. She investigated his claim before giving him the letter of censure and found that while he had mentioned several dates in a late February meeting, CDR X and her assistant "both recall[ed] these [dates] as being passed as tentative or targeted dates. Subsequent Department Head meetings between late February and late March were void of additional discussion of these dates or the events planned." In addition, on March 27, 2008, yn2 x sent the applicant an email, which was copied to the CMC, saying, "I wanted [to] confirm with you that the 11th of April is still good for our next sports day as the softball sports/morale day. Request your confirmation of the time and date so we can make the

reservation for the fields, and funds.” CAPT X stated that when the CMC saw this email, she pointed out to the applicant that there was a conflicting retirement ceremony on CAPT X’s calendar for that date, and the applicant told the CMC that he was “going forward with the date anyway.”

CAPT X denied the applicant’s claim that he had no prior knowledge of the xxx office move. CAPT X stated that she told all of the Department Heads several times that no one should move until a plan was developed and approved and the crew had been briefed at an all-hands meeting. CDR X had repeated these directions at a follow-up meeting. However, according to the EO and Mr. X, the head of the xxx Shop, the applicant was briefed on their intention to move the xxx offices in February, before he went on leave, and had received the applicant’s approval. Then, when the applicant returned from leave, he did not disclose that the offices had moved. CAPT X did not discover the move until mid March, and at their meeting on March 21, 2008, the applicant initially admitted having known that the xxx offices intended move and that he had not passed on her orders about office moves to his subordinates but, later during the meeting, claimed that he thought that CAPT X had approved the move. When she asked the EO and Mr. X separately about emails they had written about the xxx office move at the applicant’s request, they told her that they had written to include “as much detail as they could in their emails without being dishonest.” She alleged that when she asked what they meant, they both stated that they had specifically avoided claiming that the applicant did not know their intention to move their offices because he had, in fact, known and approved of the move before he went on leave, but they knew he was trying “to cover his tracks.”

CAPT X denied the applicant’s claim to the PRRB that she had failed to counsel him on her expectations until three months after she arrived. She stated that she met with each of the Department Heads, including the applicant, soon after she reported to the Xxxxx. She stated that these in-briefs were “uneventful and consistent with the Command Cadre in-briefs [she has] conducted in [her] previous five command cadre assignments.” (CAPT X had twice commanded a ship and she had been a Deputy Group Commander, Group Commander, and Deputy Xxxxx Commander.) Following her in-brief, the applicant was in her office almost daily and they held frequent impromptu meetings in which they “would sit and discuss at length my philosophies, my view on personnel matters, and his various duties and responsibilities including his role as the unit’s collateral duty coordinator. I provided him with my expectations, tasking, and on-the-spot performance feedback on a wide variety of issues, including documents or actions he was taking, and so on.” Besides their one-on-one meetings, she also met with the Department Heads and command cadre “to discuss my expectations and command philosophy.”

CAPT X denied the applicant’s claim to the PRRB that he had had no problems understanding her messages or directions or those of the prior Xxxxx Commander. She stated that during the marking period, she learned that he had signed for members’ awards, including a Commendation Medal, even though it was “both outside the scope of his duties and responsibilities and above his award authority.” CDR X told her that the prior Xxxxx Commander would never have granted the applicant this authority and that when the prior Xxxxx Commander “uncovered [the applicant’s] practice, he immediately ordered it stopped.” However, she did not consider this breach of policy in preparing the disputed OER because it had happened during a prior evaluation period. However, she was told “of additional, similarly flagrant examples of his

misunderstanding the intended message of the previous Xxxxx Commander” that resulted in his being counseled for overstepping his authority.

CAPT X denied the applicant’s claim to the PRRB that he was never counseled about his listening skills. She alleged that after the XXX’s wife accused another member of rape, she told him “no less than 3 or 4 times” to make certain everyone treated the case “as a rape and sexual assault and that they expressly follow the Commandant Instruction.” However, he ignored her direction “both in the initial notification to CGIS as well as several other follow-on actions that surrounded this case. His actions caused significant hardship on the victim, the accused, the families, and the unit. [She] provided [the applicant] with performance feedback on this case.”

CAPT X alleged that the applicant’s deficiencies accumulated to the point that she counseled him on March 21, 2008, because “detailed reminders at meetings, follow-on emails, one-on-one counseling, and on-the-spot performance feedback [were] not altering his performance.” At their 2.5-hour meeting on March 21st, she counseled the applicant on his failure to keep Department Heads and the Command Cadre informed “on a wide variety of issues, including morale events. He was counseled and provided detailed examples of various issues where his failure to keep the Command or Department Heads informed of personnel actions caused additional workload for the command, his fellow Department Heads, and the staff.” At the end of the meeting, she told the applicant to send her a summary of their conversation and the follow-on actions she had requested. However, he failed to provide her with a summary of their conversation and instead “only provided follow-on actions, a detail that did not escape me or the Deputy.” Therefore, she intended to provide him with “amplifying, electronic documentation of the counseling sessions,” but before she followed up, she received his email regarding the Morale event he had approved for April 11, 2008, which was a date for which four of the five command cadre members, including him, had conflicts. Therefore, instead of documenting the counseling session herself, she prepared the Administrative Letter of Censure.

CAPT X denied the applicant’s claim to the PRRB that she refused to discuss the OER with him. She stated that she gave him the draft in his office so that he could review it in private before meeting with her. He brought the OER to her office rolled up in his hand for the OER counseling and close-out session since he was transferring, and when she tried to discuss the OER with him, he refused twice. When she asked him why he would not discuss it, he said that the OER did not matter and that “no matter what is in this OER, I know what I have done here.” He told her that she was “nothing more than an instrument in God’s hands, the push that perhaps I need to become a missionary.” When she asked if he was sure, he said he was, and she told him that if he changed his mind, they could discuss the OER later.

With regard to the applicant’s request for an award, CAPT X stated, she told him at their last meeting that she could not award him one because of his performance deficiencies. She told him that she could not sign an award citation stating that he had “upheld the highest tradition of the United States Coast Guard.” CAPT X noted that after the applicant left the Xxxxx, “several crew members came forward to the Command Master Chief, the Deputy and I expressing their concern for the disloyal and inappropriate comments made by [the applicant] during this marking period. Some of these comments were about me, or other senior officers at the unit and made to his subordinates. Several comments contained profanity or emotionally charged verbiage.” She

offered to help the PRRB contact these people if necessary. In support of her allegations, CAPT X submitted several documents, including the following:

- Several pages from the Xxxxx Organizational Manual and the Xxxxx's draft Standard Operating Procedures show that one of the responsibilities of the head of the Xxxxxx Department is oversight and administration of the Xxxxx's Morale, Well-Being and Recreation (MWR) program.
- An affidavit from the Xxxxx's Morale Officer, LT W, who stated that the applicant had designated him as the Morale Officer and was the approval authority for Morale events until April 2008, when he was told to submit all such matters directly to CAPT X. The applicant approved the date for the April 11 event and the date had to be changed to accommodate CAPT X's calendar.
- On March 17, 2008, yn2 x, the Unit Health Promotions Coordinator at the Xxxxx, sent an email to several crewmates saying, "Let me know if the 11th of April will work for the softball/sports day. That's what [the applicant] has in mind." Then on March 27, 2008, yn2 x sent an email to the applicant asking if April 11th was "still good for our next sports day as the softball sports/morale day. Request your confirmation of the time and date so we can make the reservations for the field and funds." The email was cc'ed to the CMC, who replied that CAPT X, CDR X, and she would all be away that day and asked if the event could be rescheduled. In addition, in an email dated May 7, 2009, yn2 x stated with regard to the Xxxxx's sports days, "from the time I reported to Xxxxx ... in Sep 2004 to end of AY07, final approval came from [the applicant] as per his and former [Xxxxx Commander's] instructions. I do not remember much of the events or conversations that led up to the Sports Day event in April 08, but I do recall there being emails sent to [the applicant] requesting approval for a sports day during that time with [CAPT X's administrative assistant] being copied."
- In an email dated February 15, 2008, CAPT X asked the applicant how dates for events were selected because the last two had been scheduled when she had conflicts and she had learned of them only after it was too late to attend. She also wanted the Department Heads to be able to attend the events. She stated that she wanted the Command Cadre to be notified in advance so that schedule conflicts could be "resolved BEFORE a date is 'approved' and announced to the crew." The applicant responded that such events usually happened on the second Tuesday of each month and they had an event already set up for March. He stated that the dates had never required "vetting" or coordinating with the command calendar before.
- A four-page "command philosophy" she prepared for the Xxxxx about her philosophy and expectations.

***Declaration of CDR X, the Deputy Xxxxx Commander, for the PRRB***

CDR X denied the applicant's claim to the PRRB that his portion of the disputed OER was changed or that he was directed to change the marks and comments. CDR X stated that the OER reviewer and told them that the sections were not consistent in how they addressed the applicant's listening skills. CDR X stated that he reviewed his portion of the OER, reconsidered his marks, and comments, and revised the mark and comment for listening skills "to more consistently match the behavior I had witnessed as Supervisor ... during that marking period."

CDR X denied the applicant's claim to the PRRB that he was criticized in the OER for a duty that was not his responsibility. CDR X stated that the "documentation and information regarding morale funding, reports, meetings and events were routed through" the applicant as "a normal course of business." Both the Unit Health Promotion Coordinator and the Morale Committee Chairman worked for the applicant in the Xxxxxx Department, and he briefed such events at Department Head meetings. The Morale Officer worked in the Response Department but "reported directly to [the applicant] regarding all morale related responsibilities and issues." CDR X stated that it was the applicant's responsibility to ensure that the morale and sports events did not conflict with other scheduled events so that the command cadre could attend and show good leadership. "In fulfilling this responsibility, [the applicant] had been directed by [CAPT X] to coordinate with the Administrative Assistant, but this did not mean that merely announcing a date at a meeting relieved [him] of his responsibility or transferred his responsibility to the Administrative Assistant."

CDR X denied the applicant's claim to the PRRB that CAPT X failed to communicate her expectations. He noted that CAPT X "very clearly explain[ed] her expectations to all senior staff members ... [The applicant] was at that meeting." In addition, the applicant's office was in close proximity to CAPT X's office and they had daily one-on-one contact. CDR X stated that "[w]hether intentionally or unintentionally, [the applicant] failed to carry out [CAPT X's] clear direction regarding the morale/sports day event, the handling of a potential rape case and related coordination of this case with CGIS, and an office relocation of part of the Xxxxxx staff prior to a move plan being approved by [CAPT X]." CDR X concluded that the disputed OER accurately reflects the applicant's performance and that all of the applicant's allegations to the PRRB were "inaccurate, unfounded and untrue."

***Declaration of the Command Master Chief for the PRRB***

The CMC stated that after she reported to the Xxxxx in August 2007, the Health Program Coordinator, yn2 x, expressed concern that the Command Cadre seldom attended sports day morale events. She noted that "the events were seldom announced in a timely manner and that the information was not making it to the Deputy or the Xxxxx Commander level so they could participate." She suggested that he begin cc'ing her on emails so that she could check for conflicts. However, when yn2 x cc'ed her on an email in which he asked the applicant to confirm a particular date, she checked and noted a conflict, so she contacted the applicant to inform him of the conflict. However, he came to her office and said that he was going to go forward with the date despite the conflict.

The CMC also denied that CAPT X used excessive foul language. In addition, she noted that after the applicant left the unit, a member told her that the applicant had made an inappropriate comment about CAPT X.

### ***Declarations of CDR Y***

CDR Y provided two statements for the PRRB. In the first, he stated that at a Department Head meeting on February 27, 2008, the CAPT X was absent, but CDR X was present. At the meeting, the applicant announced the dates for the next three morale events, including a March 11th soccer event, an April 11th softball event, and a Xxxx Gardens trip scheduled for either May 16th or 23rd. CDR Y stated that he noted down the dates to avoid scheduling work for his subordinates on those days. CAPT X's administrative assistant was taking notes, and CDR X told the assistant to check CAPT X's calendar to ensure she had no conflict with those dates. However, in early April, CDR Y stated, he heard a rumor about a conflict between the applicant and CAPT X because she had a conflict with the April 11th morale event. He then went on leave for a couple of weeks but upon his return, offered CDR X his notes of the February 27th meeting to show that the applicant had indeed briefed the April 11th date at the meeting, but CDR X stated that it was not necessary. In support of his allegations, CDR Y submitted a copy of his notes of the February 27th meeting, which shows the planned dates for the three morale events.

CDR Y also submitted a statement alleging that the space allocation working group "reported directly to the Xxxxx Commander and were not authorized to discuss pre-decisional information. Department heads were not included in this process or privy to any of the briefings provided by the committee to the Xxxxx Commander or Deputy." CDR Y also denied ever hearing the applicant curse; stated that when the CDR X was gone for three weeks in the spring of 2008, the applicant and other Department Heads took turns as Acting Deputy Commander; and that CDR X had expressly told the applicant and other Department Heads to submit their OER input as a draft OER rather than as bullets before CAPT X announced that she expected each supervisor to write his subordinates' OERs based on bullets and supporting documentation.

### **SUMMARY OF APPLICANT'S ALLEGATIONS ABOUT PRRB DECLARATIONS**

The applicant included in his application many allegations about statements contained in the declarations submitted to the PRRB. For example, the applicant alleged the following:

- The Command Philosophy provided by CAPT X was not actually applied during the evaluation period.
- The applicant and CDR Y wrote their own OERs "under the direction of [CAPT X]. While the Deputy specifically gave the direction, [CAPT X] was standing beside him giving consent when it was said" and CDR X confirmed his request even after CAPT X stated at a meeting that supervisors should write the OERs, which should cast doubt on CAPT X's statements.
- CAPT X and CDR X contradicted themselves, the April 7th Letter of Censure, and each other in their declarations to the PRRB.

- The applicant did not have the “final say” in picking dates for Morale events and his responsibility for the dates ended when he passed the information at the Department Heads meeting attended by CDR X and CAPT X’s assistant.
- The applicant did not admit to having known about the xxx office move in advance at the March 21, 2008, meeting and could not possibly have passed on her instructions about not moving offices since he was “out of the loop” regarding the relocation committee that was planning office moves.
- CAPT X’s comments in her declaration about his signature on award forms were irrelevant since he signed for awards only during a prior evaluation period and it was never a problem until CAPT X heard about it in late March 2008.
- CAPT X claimed not to know what he was talking about when he mentioned her misinterpretation of his information in her email to the Chief of Staff at the March 21st meeting.
- Many of the allegations made against him by CAPT X at the March 21st meeting resulted from CDR X failing to perform work timely or to pass information to her timely and the allegations were dropped when he pointed these facts out and offered to prove them.
- CAPT X held him to a higher performance standard than she did CDR X, who claimed at the March 21st meeting that the applicant could not expect them to read long emails on their cell phones when they were traveling.
- CAPT X did not require him to provide her with a summary of their discussion at the end of their March 21, 2008, meeting and did not ask him for such a summary after he only sent her the email regarding actions she asked him to take.
- The plan to speak to CGIS agents only in conference calls was made at the March 21st meeting as a response to special agents providing conflicting information on several occasions, not because of any alleged failing on the applicant’s part.
- At the March 21st meeting, CAPT X told him, “You’re a f\*\*\*\*\*g Commander, I shouldn’t have to tell you how to do your job,” and when he replied that he thought he had been doing a good job based on his prior OERs, “she continued with the profanities for an extended period. The meeting lasted for the next 2 hours or so. She made several accusations without any proof. ... she calmed down for the last 15 minutes or so of the meeting and was relatively pleasant, and we finally got to the position to rationally talk about things she wanted me to do for her, which were miniscule in nature, as noted in the email to her and the Deputy.”
- At the March 21st meeting CAPT X “went into an extended tirade in which she was sitting on the edge of her chair, arms flailing and hitting her head as if indicating I was dumb (like used for sign language), head spinning as if in a stupor and rocking in her chair and shouting out the ‘F-bomb’ numerous times and saying how I’ve f\*\*\*\*d up so many things, she doesn’t know what’s going on in my f\*\*\*\*\*g brain, and she has to work late to cover my f\*\*\*\*\*g mistakes and that I am not the f\*\*\*\*\*g CO of anything. ... I had done nothing to deserve the outburst.”
- CAPT X frequently used foul language and would “get ‘spun up’ ... [so] we’d have to ‘peel her off of the ceiling with a spatula to get her to come back down.’”
- CAPT X had very poor “listening skills” herself, would frequently misquote people within seconds of being briefed, and required repeated “overbriefing,” as shown in the March 7th emails.

- The CMC's claim that CAPT X did not use "excessive foul language" is not probative since "excessive is a relative term for each individual."
- The CMC had previously refused to submit a statement on his behalf, claiming that she could not recall the events in question.
- The CMC coached yn2 x in making his statement about the applicant approving all of the Sports Day dates.
- The CMC's declaration should be removed from the record "in its entirety for potential integrity and collusion issues" because he believes that it "may be based on a form of 'group think' when the cadre was collecting the information for their [declarations for the PRRB]."
- The applicant did not use profanity or make derogatory statements about CAPT X or other members although he was very emotional about their accusations and the disputed OER, CAPT X submitted no statements to support this claim, and because CAPT X stated that this information was received after the evaluation period ended, it is irrelevant to the disputed OER.
- CAPT X did not counsel him about the disputed OER as she alleged. After she gave him a copy of the draft OER, saying she would not discuss it, he photocopied it and took it back to her office. He was not invited into her office for a counseling session. Instead, she just asked him twice if he had anything to say.
- At their "check-out interview" prior to his departure, she asked him what were the best and worst things about his tour at the Xxxxx. He told her that the "worst thing was the last few months in which I had been persecuted in my opinion, that I could not believe the lack of trust, and that it didn't seem like she would listen to any explanations, always seeming to have a preconceived idea about the issues." She asked him to elaborate, which "opened up a brief and reserved discussion about the key issues discussed in the OER. ... It was very apparent that the meeting was just a formality and that the CAPT was no more willing to discuss the issues than she had been before."
- The applicant stated that he did not tell CAPT X that the OER might be God's way of telling him to get out of the Coast Guard, only that it might be God's way of telling him to "go in another direction"; that they did not discuss the OER in depth, contrary to her allegation; and that she did not tell him to call her if he changed his mind about discussing the OER.
- CAPT X told him numerous times during his check-out interview, "I want everyone to see that we had a personality conflict," showing that she used the OER for her personal vendetta.
- CDR X's claim that the OER is accurate contradicts his prior request for the applicant's input for an end-of-tour Meritorious Service Medal, which supports his claim that CDR X was improperly influenced.

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

On July 23, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC, the successor to the Personnel Command).

The PSC submitted new affidavits from the applicant's rating chain and stated that the rating chain has verified the accuracy of their marks and comments in the disputed OER and that the marks and comments properly described the applicant's strengths and weaknesses. The PSC alleged that the applicant "did not provide evidence to indicate the disputed OER was not completed in accordance with OES [Officer Evaluation System] policy." Regarding the applicant's request for an award for his tour at the Xxxxx, the PSC stated that recommending an officer for an award is within the authority and discretion of the Xxxxx Commander. The PSC recommended that the Board deny all relief because the applicant "has not provided evidence that overcomes the presumption of regularity."

### ***Second Declaration of CDR X***

CDR X stated that his first declaration "was made in direct response to specific comments made in [the applicant's] sworn PRRB statement." This second declaration addresses "the major issues" in the applicant's BCMR application, and the lack of a comment on any specific point does not mean he agrees with it.

CDR X stated that after reading the applicant's draft email of March 7, 2008, he discussed the matter with CAPT X, "who I believe called the Chief of Staff to make sure any inconsistencies were cleared up. ... I do not believe that [CAPT X] was upset by the email or that it was a defining event that colored her perception of [the applicant]."

CDR X denied that he ever said he was under intense pressure from CAPT X or that he could not provide "top cover" for anyone because he was "too busy keeping his own head above water in his dealings with her." He alleged that the applicant's allegation about this is false and that CAPT X and he "had very open and frank communications and interactions on a daily basis and I felt very comfortable in bringing up issues related to staff, personnel and day to day xxxxx operations."

Regarding the OER comment about the applicant's failure to "deconflict" morale events and scheduling one when four of five members of the command cadre could not attend, CDR X stated that information about events "was not always passed to the senior staff in a timely manner, which made it difficult for the department heads and their personnel to plan to attend those events. ... The direction from the CAPT was that once tentative dates were discussed at a staff meeting, the morale and/or Health Promotion representative was to sit down with the Administrative Assistant and review the Command Calendar to make sure there were no major conflicts. Once that was done, the event dates would be approved and announced to the crew." CDR X stated that the applicant's announcement of dates at one staff meeting did not fulfill this direction. "The correct process was to socialize the tentative dates at the staff meeting as far ahead of time as possible, then have the committee representative sit down with the Administrative Assistant to make sure there were no conflicts, then request approval, then announce the date to 'all hands.' Clearly, [the applicant] did the first and last steps, but the middle two steps were not followed." CDR X stated that the fact that the applicant mentioned tentative dates for the morale events on February 27, 2008, did not shift his responsibility or that of his subordinates to himself or the Administrative Assistant. CDR X noted that the applicant's own email dated February 27, 2008, shows that the dates he passed at the meeting later that day were tentative.

Regarding the GV audit, CDR X stated that, contrary to the applicant's claim that after forgetting to do the audit he passed the work to the applicant, CAPT X had not tasked CDR X to do it but had tasked him with tasking the applicant to do it since the vehicles were managed by the applicant's Engineering Division. When CDR X forgot to do so, CAPT X reminded him, and CDR X forwarded the email to the applicant.

Regarding the applicant's claim about CDR X forgetting the location of a package that was actually on his own desk and becoming upset with the applicant, CDR X stated that this story is untrue. The package was not late, he did not "lose awareness of where the package was, and [he] did not become upset at [the applicant]."

Regarding the applicant's claims about CDR X being late in replying to time sensitive issues, CDR X stated that both he and CAPT X were sometimes away from the Xxxxx and on the "road" and that "during these trips most routine issues would have to wait until our return. ... These were issues that could wait until our return. [The applicant's] argument seems to be that he should not be held accountable for lack of timely briefs, if my responses were not always 'timely' in his estimation. He was not held accountable for lack of timely briefs, but he was held accountable for not following the CAPT's explicit and unambiguous direction regarding how morale events should be scheduled." CDR X stated that the applicant's allegations are attempts "to shift the blame for not meeting his responsibilities to me or others" and "are untrue and unfounded accusations."

Regarding the OER comment about the xxx office move, CDR X stated that the applicant showed him the emails from the EO and Mr. X but he did not agree with the applicant that the emails "cleared up the issue" since neither of them said that the applicant was unaware of their intention to move the office before it occurred. CDR X stated that it appears that the applicant "put pressure on them to write the emails to make it look like he, [the applicant], was not aware of the move" but they avoided lying but not actually saying that he was unaware of the move.

Regarding the applicant's handling of an alleged rape case, CDR X stated that since the CWO could not hear the CGIS agent's side of the telephone conversation with the applicant, "he cannot be sure what the Special Agent said. However, Special Agent [G] was very clear that he had told [the applicant] that the Master Chief could sit in on the CGIS interview with the spouse and that the Master Chief would then have to write a statement per their requirement when non-CGIS persons are present during an interview. CGIS Agents are very thorough, by the book, and deliberate in stepping through investigations and the two CGIS Agents we worked with on a daily basis were no exception. This incident was the main reason for instituting the 'conference call' policy outlined in [the applicant's email dated March 21, 2008]." CDR X also denied the applicant's claim that he and CAPT X were not supposed to be "in the loop ... Discussions regarding this case/investigation were proper and within all required bounds focusing on recommendations for our way forward."

Regarding CAPT X's communication of her expectations, CDR X stated that her "expectations, Command Philosophy and direction were consistent and plainly delivered on numerous occasions and were clearly understood by me and by the rest of the senior staff." CDR X stated

that he advised the applicant that “every leader has a different style and that [the applicant] needed to uphold [CAPT X’s] methods and approach to executing our missions.” Regarding CAPT X’s alleged use of profanity, CDR X stated that she seldom used it and “was always in control of her actions and acted professionally.” He stated that the applicant’s claim that she used “boatswain’s mate language” at their meeting “is an extreme and inaccurate exaggeration of the meeting. That certainly did not happen as described and would have been completely out of character for [CAPT X].”

Regarding the applicant’s claim that his prior command had authorized his actions and had no problems with his performance, CDR X stated that this claim is untrue and that both he and the prior Xxxxx Commander had counseled the applicant about “overstepping his bounds of authority in several areas, none of which were authorized” as the applicant claimed. For example, the applicant “was conducting masts (formal military disciplinary procedures) without pre-briefing us. He was signing awards, which is reserved for the Xxxxx Commander or the Deputy when Acting Xxxxx Commander, and he was allowing his community contacts to think that he was the Base Commanding Officer, which he was not. [The applicant] had also planned the Coast Day Picnic, a morale event, when the Xxxxx Commander and I had another commitment and could not attend. When faced with these issues, [the applicant] tried to shift the focus by mounting a character attack on [CDR Y], our Prevention Chief, stating that she was difficult to work with and had publicly embarrassed him during Department Head meetings.”

Regarding the applicant’s claim that CDR X had directed them to write their own OERs, CDR X stated that he remembers that a couple of the Department Heads offered to complete draft OERs for themselves and he told them they could if they wanted to since it would alleviate his own workload. However, he never required anyone to do so as it was not allowed by OES policy. He stated that some officers like to draft their own OERs “because they want to have a greater level of control over the specific remarks and wording to ensure it sheds the best possible light on their good performance.”

Regarding the community’s confusion over the applicant’s title and authority at the Xxxxx, CDR X stated that the confusion “had been going on for some time” and continued during the evaluation period. For example, soon after CAPT X arrived, a man at CDR X’s church asked him how he liked working for his CO. When CDR X’s response showed that the Xxxxx Commander was female, the man looked startled and said, “Her? Don’t you work for [the applicant], isn’t he your CO?” In addition, at CAPT X’s change of command ceremony, a Support Center chaplain asked why the applicant was not sitting in the front row with all of the other COs.

CDR X also denied the applicant’s claim that CDR X had recommended him for a Meritorious Service Medal. He stated that the applicant submitted information for an award and CDR X did reply to say that he had “more than enough supporting information for me to draft an award for him, which was true.” CDR X also noted that any award would have covered the applicant’s entire tour at the Xxxxx, not just the evaluation period for the disputed OER. Therefore, the verbiage of an award citation would not prove that the comments in the OER were erroneous. With regard to the differences between the mostly high marks he assigned versus the mediocre marks assigned by CAPT X, CDR X stated that the supervisor’s and reporting officer’s

sections of an OER address different aspects of an officer's performance and that the fact that the applicant accomplished a lot was reflected in the marks CDR X assigned, but "how he went about it" was reflected in CAPT X's section.

CDR X stated that nothing in the BCMR application persuades him that that the disputed OER should be reconsidered. He alleged that he assigned the marks and comments "of my own volition" and that the disputed OER "was and is an accurate reflection of [the applicant's] performance during the [six-month] marking period and should be retained in its entirety."

In support of his allegations, CDR X submitted an email conversation in which the OER reviewer, CAPT Y, noted the difference between the supervisor's and reporting officer's sections of the OER. In particular, he noted that the criticisms of the applicant's "listening skills" in the reporting officer's section were not consistent with the supervisor's mark for listening skills. CAPT X forwarded the email to CDR X and asked him to read CAPT Y's email and the written standard on the OER form for a mark of 4 and for listening skills and to "consider this mark (NOT requiring you to change it) and see if you concur with his assessment of that mark, or your original mark."

### ***Second Declaration of CAPT X***

CAPT X stated that she read the applicant's BCMR application and remains convinced that the disputed evaluation is an accurate and fair reflection of the applicant's performance during the evaluation period and should be "retained in its entirety." She stated that she would address only the major issues but that her silence on minor issues should not be interpreted as agreement with the applicant. She noted that although the applicant submitted her declaration for the PRRB, he did not include all of the supporting documentation she submitted to the PRRB. CAPT X repeated her statements to the PRRB and also stated the following:

With regard to the applicant's claim that the retirement ceremony she attended on April 11th was entered only on a personal calendar and not the command calendar, CAPT X submitted a copy of the "DXX-XXXX[XX] Command Calendar" printed out on February 15, 2008, which includes an entry showing that she was attending the retirement ceremony and would be gone from April 10 to 12, 2008. CAPT X stated that one of the topics of their March 21, 2008, counseling session was his "inability to coordinate or check dates ahead of scheduling events and work as a team player."

CAPT X also noted that on March 25, 2008, the applicant sent an email attempting to schedule another event, a Material Inspection, on April 11, and she replied by advising him that she would be out of town that day so the inspection should occur on another date. CAPT X submitted a copy of these emails. Moreover, on March 28, 2008, even after the CMC advised the applicant of the command cadre's conflicts with the April 11th date, the applicant sent out an email announcing the event for April 11th. Thereafter, CDR X took over and rescheduled the event for April 25th, but she was unable to attend because of the "unscheduled early arrival of the nuclear submarine, USS [XXXXXX]," for which she was one of the three Unified Command Cadre members responsible for leading and providing security for the commissioning of the submarine. CAPT X submitted an email dated April 24, 2008, in which she apologized to yn2 x

for not being able to attend the morale event the next day and a message from the Xxxxx to all subordinate units thanking them for their hard work regarding the “commissioning events held between 23 April to 5 May 2008.” CAPT X also alleged that the applicant’s claim that she skipped the March 11 morale event because of the weather is untrue because she out of town that day to attend a ceremony in North Carolina and to conduct unit visits with the District Commander. She submitted an email from Marriott Hotels showing that she would be checking out of a hotel on March 11, 2008, and an email regarding the schedule for her unit visits with the District Commander on March 12 and 13, 2008.

Regarding the applicant’s claim that he did not know about or approve the xxx office move, CAPT X submitted an affidavit from the EO stating that the applicant had known about the move taking place while he was on leave and had approved it.

Regarding the applicant’s handling of an alleged rape case, CAPT X stated that the applicant called her and told her that a member had found a fellow crewmate “partially unclothed and ‘passed out’ on top of his ... wife.” The applicant told her that he was simply passing along the information because the victim had said she would not press charges. CAPT X told him to call CGIS and to treat the matter as a rape case anyway and to follow the Commandant’s Rape and Sexual Assault Instruction. The applicant said that it was not necessary because the matter was not reported to him as a rape. CAPT X told him to treat it as one anyway and that no one except CGIS should ask the victim or the accused about the incident because the first time they spoke of the matter should be with a CGIS agent. She told him to ensure that the officer in charge of the unit in question followed the instruction as well. The next day, she heard that the victim had gone to the hospital for a “post-rape exam.” Later, a CGIS agent told her that CGIS had not treated the matter as an assault and so they were “behind gather information and evidence.” When she asked the agent why CGIS had not treated the matter as an assault, he told her that the applicant “did not make the report to him as a rape or sexual assault” and “had relayed to him that it was nothing more than a report of two consenting adults being caught together, and CGIS does not normally investigate those cases.” Later, the CGIS agent came back and said that the accused had refused to speak to him because the applicant had “spoken to the accused, [and] facilitated a call to a local attorney, who in turn advised the accused not to speak with CGIS.” When she gave the applicant on-the-spot feedback about his actions, he contacted a District legal officer, who also told him that his actions were inappropriate since the command needed to appear and remain neutral.

On March 19, 2008, CAPT X stated, the CGIS agent was still trying to get an interview with the accused and the accused’s wife. The applicant emailed her and stated that the CGIS had agreed to let the accused’s wife meet with the CMC. However, CAPT X later received an email from the CGIS agent who was upset that the meeting had occurred. When CAPT X advised him that she thought he had approved it, the agent stated that he had only granted permission for the CMC to sit in on his interview with the accused’s wife, not to have a separate meeting before his interview. As a result of this incident, the CGIS Special Agent in Charge asked that all information be passed through conference calls or with her or CDR X because “this was not the first time that [the applicant] had passed along incorrect information to the command.”

Moreover, CAPT X stated, the applicant told her that a District legal officer had told him that he could not pass the telephone numbers for the Employee Assistance Program or the Work-life program to the people involved in the alleged rape case. CAPT X was certain this was not true since those programs were created to help people in such circumstances, so she told the applicant to call the legal officer back to get confirmation of this prohibition. When the applicant did not report back to her, she called the legal office, and the legal officer stated that the applicant "had missed the intended message" and that he had not stated what the applicant had told her. CAPT X stated that when the laboratory results showed that no sexual intercourse had occurred, it appeared that the two people had simply passed out on the floor together, and she and CDR X discussed how to proceed. They convened a unit all-hands meeting with the crew to overcome the potential stigma for the crewmember before returning him to his unit.

CAPT X stated that she called the previous Xxxxx Commander, who confirmed that he had learned that the applicant had been signing for awards and had ordered him to stop. To ensure that the awards that had been improperly made were legitimized, they consulted the legal office. She was advised that as long as the Awards Board at the Xxxxx had approved the awards, they would not have to retype the citations. However, the applicant had signed a recommendation for a Commendation Medal, which only captains and officers of higher rank may sign for. Because the Awards Board had approved an Achievement Medal for the member instead, no action was necessary. CAPT X stated that although the applicant had signed the awards prior to the evaluation period, the "research and re-work conducted over several days by various District Offices and the Xxxxx staff was ... within the marking period." In support of these claims, CAPT X submitted copies of award recommendations signed by the applicant in 2006 and emails dated March 26, 2008, about seeking copies of all of the award paperwork that the prior Xxxxx Commander had not signed.

CAPT X stated that she had verbally tasked the applicant with performing the GV audit in February and he suggested a start date of March 1st. They spoke of the need to ensure that each vehicle contained a log sheet. He noted that there had been a log sheet in each vehicle during a prior inspection but that "things had begun to slip since the inspection." In early March, she sent a follow-up email to CDR X. Then, during their March 21st meeting, she asked the applicant how the audit was going, and he stated that he could not recall their conversation. CDR X admitted that he had failed to forward her follow-up email to the applicant. However, on April 9th, there was still no log sheet in her government vehicle, so she knew the audit was not being conducted. When she questioned the applicant, he blamed the junior enlisted members in the motor pool. CAPT X submitted emails indicating that on March 7, 2008, she thought the GV audit was already being conducted, and on April 9, 2008, there was no log in the GV she used.

With regard to the emails of March 7, 2008, CAPT X stated that when the applicant returned from the Xxxxx Xxxxxx Department Head Conference, he briefed them on some potential budget reduction strategies the District might take and one was a potential ban on the purchase of furniture. This caught her attention because she needed furniture for several new billets that were being added to the Xxxxx. The applicant indicated that a request to buy furniture might be rejected by the District and that it was not in the budget. She disagreed and noted that the Coast Guard budget model provides for one-time non-recurring costs to the unit for the purposes of purchasing furniture, computers, and other items necessary for a new billet. She sent

the email to the District Chief of Staff on March 7, 2008, to seek confirmation that they could purchase new furniture for the new billets “without a penalty.” She also expressed her concern over the fact that the Xxxxx relied heavily on a housing maintenance allowance for unused housing that would disappear as soon as the property was sold. A little while after she forwarded the Chief of Staff’s reply to the applicant, CDR X showed her the draft email that the applicant had given to him. They discussed it and she called the Chief of Staff to “let him know of the corrections that [the applicant] had made to my furniture email, and should he hear back from the budget folks, that was the nature of the discrepancy.”

CAPT X stated that during their meeting on March 21, 2008, the applicant raised the issue of the incorrect information in what he called her “budget email” to the Chief of Staff. Initially, she did not know what email he meant, but when he described it, she reminded him of their discussion of furniture at a meeting that had precipitated her email. CAPT X further stated that by July 30, 2008, the Xxxxx was in fact in a “budget emergency. The new Xxxxxx Chief and Supply Officer uncovered a \$58,000 issue with the budget.” She called in a financial expert from the District to conduct forensics on the budget to discover what had happened. “After about a week, the budget expert was still not able to account for much of our 2008 budget (from Oct – Jul).” A year later, the new Xxxxxx Department Head sent an email to the staff about preparing the 2010 budget and noted “how far we had come, and what he [had] uncovered in 2008 – declaring ‘What a mess!’” CAPT X submitted an email date July 30, 2008, about the potential \$58,000 shortfall for 2008.

CAPT X stated that the applicant’s brief contains “numerous additional distorted remarks, conjectures and fabrications.” She described several incidents in which she found his actions inadequate or erroneous. For example, she stated that in January 2008, a senior chief who was being processed for an administrative discharge for alcohol incidents asked to retire. She told the applicant that they “would wait until the investigation was completed before processing the discharge package or his retirement letter” and that the “final decision rested with the ... Personnel Command who would base their decision on the handling of similar cases.” However, a few weeks later she learned from the Personnel Command that, contrary to her instructions, the applicant had endorsed the member’s retirement request and forwarded it to the Personnel Command and that neither the request nor the endorsement mentioned the alcohol incidents or the CGIS investigation, which was still pending. “This was the first indication I had that [the applicant] was signing and processing other than routine documents without my knowledge. And in this case, signing a retirement endorsement letter counter to my direction.” When the Personnel Command rejected the first retirement request because of the pending discharge, CAPT X advised the applicant to counsel the member that his options were to request retirement in lieu of orders or to request retention and have a hearing before an Administrative Separation Board (ASB). The applicant’s response was that the member “better not fight this” before an ASB. She corrected him and stated that it was the member’s right to seek a hearing and that both the command’s recommendation for retirement and the ASB’s recommendation would be forwarded to the Personnel Command for decision. As the applicant began to leave her office he again said that the member “better not fight this,” and she stopped him again and restated that it was the member’s right to do so. Later, the applicant admitted that he told the member that he “better not fight it” and had used those exact words. She asked him why he had not followed her instructions and explained that his manner of delivery could be misinterpreted

as a threat. Therefore, she asked CDR X and the CMC to re-counsel the member and to emphasize that the command would support him if he chose to exercise his right to an ASB. CAPT X stated that the Administrative Letter of Censure she gave the applicant and her decision to withdraw his authority to conduct non-judicial punishment as CO of Military Personnel was based on this and similar incidents that caused her to lose confidence in him. Her decision was not made lightly because it “placed several responsibilities back onto the Deputy and me adding to our workload.” She noted that his was the first Letter of Censure she had written in her 28-year career.

CAPT X denied the applicant’s claim that she ever stated that the disputed OER resulted from a personality conflict between them. She stated that in their discussion of the effect the OER might have on his career, they discussed the fact that “the term ‘Personality Conflict’ ... is a term of art used by Assignment Officers to describe an OER that does not appear to be in alignment with other OERs in a person’s record.” CAPT X stated that the OER was “based on the totality of [his] performance over the 6 month marking period.”

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

On September 28, 2010, the Board received the applicant’s response to the Coast Guard’s advisory opinion. He stated, “I do not believe that the panel or [JAG] did a thorough review of the information I provided, nor did they do a reasonable job researching and investigating the issues or allegations made against me in the OER and subsequent statements.” He alleged that his OER input had not been reviewed, that he did not think it had been reviewed, and that the process was therefore not fair or complete.<sup>6</sup> The applicant repeated many of his allegations and also made the following allegations and arguments.

The applicant argued that since no one can prove what was said orally behind closed doors, the Board should consider only factual documentation and specific statements and demand that “documentation be required to show mindset at the time.” He objected to CAPT X’s statement that he blamed others for his mistakes, noting that “there is a big difference in laying blame or making a statement of who had been assigned to complete a task.”

Regarding his handling of the alleged rape case, the applicant stated that he may have unknowingly allowed the accused to use a government telephone to call a lawyer, but he apologized for having done so and recommended to CAPT X that they pass the lessons learned onto the other Department Heads. He argued that CAPT X’s claims of what she told him are too detailed to be accurate because he had plenty of experience in prosecuting cases, knew the law and procedures, and “nothing would ever have gotten done” if she had gone into so much detail in her directions to him. The applicant alleged that CAPT X’s memories of the events are mistaken because the CGIS decision not to pursue an assault case came weeks after they conducted their investigation and the special agent never complained to him about not getting any evidence. He also denied having told the accused to get an attorney and alleged that, in fact, the accused told him that his sister had already gotten him an attorney.

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<sup>6</sup> The applicant may have mistaken the Coast Guard’s advisory opinion for the Board’s decision although the Board’s cover letter forwarding the advisory opinion stated, “The advisory opinion is a recommendation only and not the final decision of the Board. It will be considered by the Board along with your submissions and military records, in reaching a final decision in your case.”

Regarding CAPT X's claim that he asked her about the effect of the OER on his career, the applicant stated that he would never have done so because he had worked in the Office of Personnel Management for three years and had himself counseled officers about why they had not been selected for promotion. He argued that the fact that she claims he asked her about this should call into question the credibility of her memory.

Regarding CAPT X's claim about the budget problems discovered after he left the Xxxxx, he asked, "How is it conceivable that this 'emergency' was unnoticed and surprisingly came up a month after my departure?" However, "it is not an abnormal thing to realign accounts at the end of the third and beginning of the fourth quarters to balance them." He noted that no discrepancies were found during the compliance inspections while he was at the Xxxxx and that the budget shortfall is irrelevant to his OER.

Regarding CDR X's change of one of the marks and comments in the disputed OER, the applicant stated that he believes CDR X "felt some level of influence to change his position to make his section to be more in line with the CAPT's." He stated that CDR X "has not answered whether he felt any influence whatsoever to change the marks to be more in line with the CAPT's submission ... Does it seem reasonable that he changed his mind [at the end of the evaluation period] without any influence?" He also alleged that he was never counseled about the revised version of the disputed OER, only the draft version prior to CDR X's change.

Regarding his responsibility over the Morale Committee, the applicant stated the although CAPT X implied that he supervised the committee, in fact he was responsible only for management and oversight, which is very different from supervision. The applicant stated that he did not attend the committee meetings and that his "only requirement was to pass the information up to the staff for their approval." He argued that CDR X's declaration affirms this fact. He also alleged that CAPT X's emails show that the April 11th Morale event was on the docket and that she had approved of it. The applicant asked why he is being held accountable for picking a date that conflicted with her schedule when CDR X was unable to do so when he rescheduled the event. In addition, the applicant alleged that the print-out dated February 15, 2008, was from CAPT X's personal calendar, not the command calendar that the members could use to check for conflicts.

Regarding the withdrawal of his authority as Commanding Officer of Military Personnel, the applicant argued that the allegation that he had been counseled about overstepping his authority is inconsistent with the high marks and praise he received from the prior Xxxxx Commander. He repeated his allegation that he was authorized to sign the awards he signed for while he was Acting Deputy Xxxxx Commander before CDR X's arrival. He noted that on at least one of the forms, he signed the form after the prior Deputy had signed it and asked why the Deputy would have sent it to him for signature if there was any question about his authority to do so. The applicant again denied having signed for a Commendation Medal and noted that CAPT X submitted no paperwork to prove he had done so. The applicant denied overstepping his authority. He noted that the prior Xxxxx Commander had given him the title of "Base CO" before the Xxxxx was organized, that there "had been a long line of CDRs in charge of [the base]," and that it was "what the townspeople were used to seeing." He alleged that the prior Xxxxx Commander

told everyone that the applicant was in charge of the base and that he (the prior Xxxxx Commander) was in charge of state-level operations, and so the prior Xxxxx Commander's statements probably created the impression that he was the commanding officer of the Xxxxx. He argued that he should not have been held accountable for the thoughts and confusion of a church member and the chaplain. He argued that if CAPT X's actions were based on "these two alleged instances, that is unconscionable."

Regarding his own allegation to the PRRB that CAPT X directed him to write his own OER, the applicant argued that hearing CDR X ask another officer to do it constitutes a direction or "at least an 'indirect or intended message.'" ... Whether or not some officers he had known may have wanted to write their OERs is not the point; we were directed to do so in violation of the OES." Regarding the GV audit, the applicant denied that CAPT X had orally tasked him with the audit before CDR X forwarded him the email. He also alleged that the emails concerning an overseas assignment package dated March 28, 2008, prove that CDR X did lose awareness of the location of the package contrary to his claim in his declaration. The applicant alleged that his emails prove that CDR X was delinquent on several important matters but was not held accountable, where as he, the applicant, was never delinquent.

Regarding his request for an award, the applicant asked, "why would I submit award information for a MSM [Meritorious Service Medal] if not directed to do so and why didn't [CDR X] change that direction in the email exchanges if it was the case that he only wanted to submit for a COMM [Commendation Medal]? It is much harder to support an MSM ... If what is said is true, would it not have made sense for him to ask for and for me to just submit the lesser requirement? Even if he only thought I should get a COMM after my accomplishments, why the change to nothing at all ... ?" He asked the Board to question CDR X on this issue.

The applicant asked the Board to require his rating chain, the EO, and the CGIS agent to answer dozens of questions and to explain numerous things. In support of his allegations, the applicant submitted an email in which he had asked the EO to answer numerous questions. The EO replied, "These events happened over 2.5 years ago, and I already provided a statement to the best of my recollection and knowledge. Respectfully, I have nothing more to add to my statement at this time." The applicant also submitted copies of a performance evaluation covering a month when he worked on the Deepwater Horizon Response and received all marks of "exceed expectations," a Letter of Appreciation he received for that work, and his second annual OER as the commanding officer of a Naval Engineering Support Unit dated March 31, 2010, on which he received two marks of 5, eleven marks of 6, and five marks of 7 in the various performance categories; a mark of "exceptional performer; give toughest and most visible leadership assignments" in the fifth spot on the comparison scale; a mark of "Definitely Promote" on the promotion scale; and a very strong recommendation for promotion to captain.

## **APPLICABLE REGULATIONS**

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Every officer normally has a "rating chain" of three senior personnel, including a Supervisor, the Reporting Officer, and the

Reviewer. Personnel Manual, Article 10.A.2.e.1.e. Article 10.A.1.c.4. states that the Supervisor 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 is normally the Supervisor’s supervisor, and the Reviewer is normally the Reporting Officer’s supervisor.

Article 10.A.2.d.2.a. states that it is the responsibility of the Supervisor to evaluate the reported-on officer in the execution of her duties and to prepare the Supervisor’s portion of the OER form.

Article 10.A.2.e.2.a. states that it is the responsibility of the Reporting Officer to evaluate the reported-on officer based on direct observation, reports of the Supervisor, and other “reliable reports” and to prepare the reporting officer’s portion of the OER form. Article 10.A.2.e.2.c. states that an RO

[e]nsures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed.

Article 10.A.2.f.2.a. states that the Reviewer “[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.” Article 10.A.2.f.2.b. states that the Reviewer “[a]dds comments as necessary, using form CG-5315 (series), that further address the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer.” Article 10.A.2.f.2.c. states that the Reviewer “[e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed.”

Article 10.A.4.c.4. instructs supervisors to prepare OER marks and comments as follows (almost identical 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.

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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 spe-

cific 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.

Article 10.A.4.c.6.a. states that block 7 on an OER "provides an opportunity for the Reporting Officer to comment on the Supervisor's evaluation. Although comments are not mandatory, Reporting Officers are encouraged to cite other information and observations they may have which would confirm or provide another perspective of the Reported-on Officer's performance and qualities demonstrated during the reporting period."

Under Article 10.A.4.g., an officer may submit a Reply to any OER for entry in his record with the OER within 21 days of receiving the final OER. An OER Reply is forwarded up the rating chain, whose members may attach endorsements with written comments. However, an OER Reply does not constitute a request to correct the OER.

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed.
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.<sup>7</sup>
3. The applicant alleged that several marks and negative comments in the disputed OER are erroneous and unjust and should be corrected (or the OER should be expunged) and that he should receive an end-of-tour award for his accomplishments. 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.<sup>8</sup> 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.<sup>9</sup> To be entitled to relief, the applicant cannot "merely allege or prove that an

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<sup>7</sup> 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"); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) ("The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process."); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>8</sup> 33 C.F.R. § 52.24(b).

<sup>9</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

[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.<sup>10</sup>

4. The applicant alleged that CAPT X was biased against him because of a draft email she saw in which he denied having told her some of the things she reported to the Chief of Staff and attributed to him in an email dated March 7, 2008. The applicant also stated that, at their meeting on March 21, 2008, CAPT X claimed not to know what he was talking about when he mentioned her misinterpretation of his information in her email to the Chief of Staff. This allegation actually supports CAPT X’s claim that she did not at first know what he was talking about when he mentioned a “budget email” because she considered her March 7th email to be about an upcoming furniture purchase. CDR X stated that CAPT X was not upset by the draft email when they discussed it and that she called the District Chief of Staff to clear up the discrepancies that the applicant had described. Therefore, the applicant has not proved by a preponderance of the evidence that CAPT X was biased against him because he drafted an email correcting her own email or that the disputed OER was adversely affected by bias.

5. The applicant received a standard mark of 4 for “Speaking and Listening” from CDR X with the supporting comment that he “[f]ailed to listen carefully for intended msgs/spken words fm Cmd, DXX(l), CGIS, etc, re sched events, pers’l cases, office moves, etc.” The Board finds that he has not proved by a preponderance of the evidence that either the mark or the comment is erroneous or unfair. In this regard, the Board notes the following:

- (a) The statement of the EO shows that the applicant knew about the pending move of the xxx office, contrary to his claim, but did nothing to stop it although he had been told that no moves should happen before the work of the committee was completed and approved by CAPT X. The statements of the EO and Mr. X submitted by the applicant do nothing to support his claim of ignorance of the pending office move and are, in fact, conspicuously silent on the subject.
- (b) CDR Y noted the Morale event dates mentioned by the applicant at the February 27, 2008, Department Heads meeting, and alleged that CDR X told the assistant to check the dates against the command calendar. However, the applicant’s own email dated February 27, 2008, and the email of yn2 x, the Unit Health Promotion Coordinator, dated March 27, 2008, support the claim of CDR X that the dates were presented as tentative, and the February 15, 2008, print-out of the “DXX-Xxxxx[XX] Command Calendar” shows that, as CAPT X alleged, when the applicant approved the April 11, 2008, event date, conflicts for CAPT X and CDR X for that date were already on the command calendar. On February 15, 2008, CAPT X had sent an emailing directing that such events be “deconflicted” in advance of approval so that most of the command cadre and Department Heads could attend. The applicant stated that the Morale Officer, LT W, should have deconflicted the April 11th event by discussing the matter with CAPT X’s assistant. However, the record shows that it was yn2 x who was trying to schedule the combined April Morale event and Sports Day, and yet when he asked the applicant to confirm the date, the applicant did so

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<sup>10</sup> *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).

without asking whether yn2 x had checked for scheduling conflicts with the command cadre and Department Heads. In addition, the CMC stated that such “events were seldom announced in a timely manner” and that, when she pointed out the April 11th conflicts, the applicant initially refused to change the date and announced it anyway. The Board also notes that although the applicant has repeatedly denied responsibility for approving the event dates, the preponderance of the evidence strongly contradicts his denial.

- (c) In her declarations, CAPT X explained in detail incidents referred to in CDR X’s comment that the applicant had failed to listen carefully to her instructions regarding the alleged rape case and other matters, to legal advice from the District, and to instructions from CGIS. The applicant’s own email telling the CMC that she could meet with the accused’s wife and the CWO’s statement that he believed from overhearing the applicant’s side of the conversation with a CGIS agent that the agent had agreed that the accused’s wife could meet with the CMC before speaking to the agent do not persuade the Board that CAPT X’s declarations are erroneous in this regard.

6. Nor has the applicant proved that the mark of 4 and negative comment added by CDR X were the product of undue influence by CAPT X or the OER reviewer rather than a result of their fulfillment of their responsibilities under Article 10.A.2. of the Personnel Manual to return inconsistent OERs for correction or reconsideration. The email string CDR X received regarding the draft OER’s inconsistent reflection of the applicant’s listening skills shows that CDR X was not directed to change his marks or comments but to reconsider them, as allowed under Article 10.A.2., and CDR X’s statements show that he made the changes of his own volition after reviewing the matter and finding that he agreed with the OER reviewer’s assessment of the inconsistency.

7. Regarding CAPT X’s comments in block 7 of the disputed OER, the applicant alleged that she should not have made negative comments about his adaptability and teamwork because CDR X assigned him above-standard marks of 5 in those categories. However, given the purpose of block 7 as described in Article 10.A.4.c.6.a. of the Personnel Manual—i.e., to “confirm [the supervisor’s evaluation] or provide another perspective of the Reported-on Officer’s performance”—the Board finds that CAPT X’s comments in block 7 are appropriate. Nor are the marks of 5 clearly inconsistent with CAPT X’s comments since she did not state that his adaptability and teamwork were below the standard expected of a CDR, as described on the OER form, but “below the level expected of a Xxxxx Xxxxxx Department Head & other O-5s *I’ve observed.*” (Emphasis added.)

8. The applicant alleged that, contrary to CAPT X’s comments in block 7 of the OER and in the Administrative Letter of Censure, he regularly kept the command cadre and fellow Department Heads informed of actions, events, and issues. He alleged that CDR X’s mistakes were erroneously attributed to him. The applicant submitted a few emails in which he informed the command cadre and others of certain matters and a few showing that CDR X did not respond immediately to every email and once forgot to pass on an email about a task—the GV audit—from CAPT C. However, in light of the CMC’s declaration and the evidence regarding the xxx office move and the scheduling of the Morale and Sports Day events, the

Board finds that these emails are insufficient to overcome the presumption of regularity accorded the disputed comments.

9. In accordance with finding 5, above, the Board finds that the applicant has not proved by a preponderance of the evidence that CAPT X's comments in block 8 of the OER about the xxx office move and the applicant's failure to ensure that Morale events were "deconflicted" are erroneous or unjust.<sup>11</sup> In particular, the Board notes that CAPT X's comment that the applicant approved the April 11, 2008, event despite the fact that it conflicted with the schedules of 4 out of 5 of the command cadre and despite CAPT X's instructions email dated February 15, 2008, about deconflicting such events is consistent with CDR X's comment in block 4 and with statements in the declarations of CDR X and the CMC.

10. The applicant alleged that the removal of his authority as CO of Military Personnel was unjust and based on CAPT X's false perception that he was presenting himself as the CO. He asked the Board to remove the comment in block 8 that he was the "Cmd rep on public committees prior to loss of trust & confidence." However, CAPT X's letter about his removal dated April 7, 2008, does not state that the removal of this authority was based on confusion over his status. Her letter addresses three separate points in separate paragraphs. The first concerns the removal of his authority to impose non-judicial punishment and use the title; the second begins, "*Additionally*, I have concerns that your use of the title ..." (emphasis added) and directs him to forward all official invitations to her office and to end his participation on the Military Advisory Committee; and the third concerns the fact that he retained his duties as Xxxxxx Department Head. In her declarations, CAPT X provided examples of the applicant's actions that caused her to lose confidence in his judgment in handling personnel issues as the CO of Military Personnel. In addition, CAPT X's removal of his authority as CO of Military Personnel and removal of his authority to represent the command on public committees are consistent with CDR X's claim that the prior Xxxxxx Commander counseled the applicant about "overstepping his bounds of authority in several areas, none of which were authorized" and had prohibited him from using the title "Base CO." Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that the removal of his authority as CO of Military Personnel or the removal of his authority to represent the command on public committees is erroneous or unjust.

11. The applicant alleged that CAPT X's criticism of his leadership in block 9 of the disputed OER is inconsistent with the applicant's appointment on February 6, 2008, to mentor a civilian employee on detail from the Marine Corps and with the fact that when CDR X was absent, the applicant was sometimes designated as the Acting Deputy Xxxxxx Commander. The appointment as a mentor occurred early in the evaluation period. The fact that the applicant was sometimes asked to serve as the Acting Deputy Xxxxxx Commander when CDR X was absent appears to be somewhat inconsistent with CAPT X's evaluation of his leadership ability and loss of confidence in his performance of his duties as CO of Military Personnel. However, the fact that the applicant continued to serve as Acting Deputy Xxxxxx Commander occasionally does not

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<sup>11</sup> Under 10 U.S.C. § 1552(a), the Board is authorized not only to correct errors but to remove injustices from any Coast Guard military record. For the purposes of the BCMRs, "[i]njustice', when not also 'error', is treatment by the military authorities, that shocks the sense of justice, but is not technically illegal." *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

persuade the Board that the OER is erroneous or unjust or that CAPT X did not exercise her best professional judgment in assessing the applicant's leadership ability on the OER.

12. The applicant alleged that all of the negative comments in the disputed OER should be removed because he received no marks below 4 in the various performance categories. Articles 10.A.4.c.4. and 10.A.4.c.7. of the Personnel Manual state that in preparing an OER, the rating official should first select the numerical mark that "best describes the Reported-on Officer's performance and qualities during the marking period." They further state that "[c]omments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance." However, the rules do not prohibit a rating official from including a comment about a weakness in an officer's performance unless a below-standard mark is assigned. The fact that the rating chain did not assign the applicant a numerical mark lower than a 4 does not prove that he had no weaknesses, and no rule prohibited them from commenting on his weaknesses.

13. The applicant alleged that the disputed OER resulted from a personality conflict between him and CAPT X and that she stated this several times during his check-out interview. CAPT X stated that during the check-out interview, they discussed the fact that a stand-alone poor OER among otherwise excellent OERs is sometimes attributed to a presumed personality conflict between an officer and a rating official. The Board finds that CAPT X's characterization of the context in which the term "personality conflict" arose during the check-out interview is much more credible than the applicant's because it is extremely unlikely that a CO would repeatedly tell a subordinate that his poor performance evaluation was based on nothing more than a personality conflict. Nothing in the record leads the Board to believe that CAPT X would do so.

14. Regarding his failure to receive an end-of-tour medal, the applicant alleged that CDR X asked him for input that would justify an MSM although CDR X stated that the highest medal for which he considered recommending the applicant was a Commendation Medal. CDR X's email thanking the applicant for his award input is dated March 3, 2008, and thus predates many of the problems that resulted in the letters dated April 7, 2008, and in the disputed OER. In any case, the decision to recommend a member for an award rests with the CO, and CAPT X has stated that she could not do so based on the language on the award citations and her assessment of the applicant's performance during the last six months of his tour of duty. The denial of an award seems harsh given the excellent quality of the applicant's three prior OERs during his tour of duty. However, CAPT X's declarations show that she had reasonable qualms about signing a statement that the applicant had "upheld the highest tradition of the United States Coast Guard." In this regard, the Board notes that the applicant had sought statements from the EO and Mr. X to attempt to prove that he had no knowledge of the pending xxx office move, when he did know of it. In addition, he disobeyed her repeated order to treat the alleged rape case as a sexual assault and to follow the guidance for handling sexual assaults and he apparently blamed others for some of his failures. Therefore, the Board cannot conclude that CAPT X acted irrationally or unjustly in deciding not to sign an award for him.

15. The applicant made numerous allegations with respect to the actions and attitudes of various officers in his rating chain and chain of command. Those allegations not specifically addressed above—for example, allegations about who used profanity, who initiated the March

21, 2008, meeting, whether CDR X or CAPT X told subordinates to draft their own OERs, and whether the applicant was evaluated more harshly than CDR X—are considered to be unproven and/or not dispositive of the case.<sup>12</sup>

16. The Board finds that the applicant has not proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>13</sup> He has not proved that the OER should be changed or expunged or that he is entitled to a medal.

17. Therefore, the applicant’s requests should be denied. The Board notes that because this decision includes the texts of CAPT X’s letters to the applicant dated April 7, 2008, no copy of the decision should be entered in his military record.

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

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<sup>12</sup> See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that “appear frivolous on their face and could [not] affect the Board’s ultimate disposition”).

<sup>13</sup> *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).

**ORDER**

The application of CDR xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied. No copy of this decision shall be entered in his military record.

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Lillian Cheng

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Randall J. Kaplan

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James E. McLeod