

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-073

XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the applicant's completed application on January 13, 2011, and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated October 13, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by removing an officer evaluation report (OER) for the period from April 1, 2008, to January 31, 2009 (disputed OER). In the alternative, he asked that the marks in blocks 3.a and 3.b. be raised from 3s to 4s and the section 9 comparison scale mark, be raised from the 3rd block (which placed him in the lowest of the three-block category described as "one of the many competent professionals who form the majority of this grade" when compared to other LTJG's the reporting officer has known) to the 4th (middle) block for this category.¹ The applicant also requested the removal of his failure of selection for promotion before the LT selection board and that "an appropriate date of rank be assigned considering his likely date of rank were he to have been selected [for LT] at the appropriate time."

¹ There are 7 blocks on the comparison scale in section 9 of the OER where the reporting officer compares the reported-on officer with others of the same grade that he has known in his career. The first block describes an officer who is unsatisfactory when compared to others of the same grade. The second block describes an officer who is "a qualified officer" when compared to others. Blocks 3, 4, & 5 describes an officer as "one of the many competent professionals who form the majority of this grade" when compared to others. The sixth block describes as officer as "an exceptional officer" when compared to others. The seventh block describes an officer who is rated as "a distinguished offer" when compared to others.

The applicant alleged that the disputed OER should be removed from his military record for the following reasons:

- It is aberrational and not consistent with [his] overall performance.
- The OER does not reflect an evaluation of his performance for the entire rating period because the supervisor observed him for only 4 months of the reporting period.
- The OER contains factually incorrect information.
- The reporting officer and reviewer both acknowledged that the OER does not accurately represent their intentions regarding [the applicant's] career.

With regard to the argument that the disputed OER is an aberration, the applicant stated that he had a distinguished career as an enlisted member of the Coast Guard prior to becoming an officer. After attending officer candidate school, he reported to the Waterways Management Division of the Marine Safety Unit Chicago for duty as an ensign. He performed well in this grade and noted that on the comparison scale for his first ensign OER he was marked in the 5th block (highest of the category described as “one of the many competent professionals who form the majority of this grade”). His next ensign OER was in the same assignment and reflected the same level of success.

The applicant's first LTJG OER is the disputed OER. During this reporting period, he had a new assignment as a “marine inspector division trainee.” He stated that four months into the subject reporting period, he was promoted to LTJG and that for the last four months of the reporting period LT S became his rating chain supervisor (LT S or supervisor). He stated that the supervisor was not satisfied with his performance and gave him marks of 3 in “planning and preparedness” and “using resources.” He stated that the 3s were radical departures from his previous OERs, in which he had received no marks lower than 4. He argued that the following comments supporting the 3s are vague and offer no quantifiable evidence that he deserved less than the “customary 4 or 5 rating” in these dimensions:

Characteristic project/time management difficulties of first tour junior officer, strained to balance own [training] requirements w/high paced operational billet . . . [and] supervisors were forced to repeatedly prompt [member] to meet deadlines and expectations.[²]

The applicant also argued that the reporting officer's comment “[member] has struggled to balance work-life issues w/high op-tempo of a dynamic field unit” in section 7 of the disputed OER lacked quantifiable evidence and that it failed to cite the cause for his work-life balance issues. In this regard, the applicant stated that the rating chain failed to take into account that

² The supervisor also wrote the following in the comments to section 5: “For OP BIG TOW, awkwardly built teams comprised from multiple unit divisions; new teams had to be identified on eve of operation, identifying lack of coordination & redundant tasking between divisions; work frequently returned for revision.”

during the rating period, the applicant was undergoing an extremely difficult time because his newly-born daughter's illness required him to spend time away from work. The applicant argued that this stressful event in his life led the reporting officer to write the comment about his difficulty in managing a proper work/life balance.

The applicant asserted that the reporting officer's mark in section 9 that placed him in the lowest of the three blocks that make up the category "one of the many competent professionals who form the majority of this grade" is inconsistent with the reporting officer's marks of 4s and 5s in the "personal and professional qualities" section of the disputed OER. He also argued that the section 9 mark is inconsistent with the reporting officer's description of his potential in section 10. The applicant argued that in describing his potential, the reporting officer noted no deficiencies in his performance and stated that the applicant "possesses standard junior officer promotion potential." The reporting officer actually described the applicant's potential in section 10 as follows:

Charismatic JO & persuasive communicator who demonstrated good initiative in areas of interest. Through continued participation in formal mentoring program, mbr should develop into productive marine safety officer. As new O2, mbr demonstrated ability to succeed in all assigned areas. LE expertise has proven to be a valuable asset to high profile unit. Broad operational experience base makes mbr a uniquely diversified officer with a well rounded perspective on CG roles and missions. As mbr continues to broaden quals & experience, will unquestionably develop into a successful JO. Recommended for promotion in accordance with normal advancement schedule.

The applicant argued that his receipt of the Team Commendation Award for Operation Big Tow and the Coast Guard Achievement Medal upon his departure from the unit conflicts with the assessment of his performance in the disputed OER and supports his contention that his performance was excellent for the period under review. The applicant referred to comments from both award citations in support of his contention. The citations are in the applicant's military record and reviewed for this decision.

The applicant alleged that he received no verbal or written counseling on the perceived deficiencies in his performance.³

In support of his application, the applicant submitted a letter from CWO2 P. The applicant noted that CWO2 P's statement indicates that the unit was dysfunctional and that the applicant floated from division to division. The applicant drew the following conclusions from CWO2 P's statement:

- The CO had little direct interaction with the applicant and expressed doubt in the applicant's supervisor's ability to provide the applicant with mentoring and supervision.

³ The reporting officer commented on counseling in section 7 of the disputed OER. In this regard he wrote "[Reported-on officer] counseled on the professional challenges ahead; while performance satisfactory, it is neither exceptional nor consistent."

- When provided with proper military leadership, the applicant excelled.
- Some leaders were setting the applicant up for failure by giving him short-fuse tasks with little or no guidance. In this regard, the following is a quote from the CWO2's statement.

It has come to my attention the [the applicant] was marked harshly for his ability to utilize resources and for his planning/preparedness skills during 2008-2009. . . . As was the pattern within the department, [the applicant] was often handed short-fused projects with little assistance [or] guidance from supervisors or peers, and consistently produced a quality, timely product . . . [The applicant] became small passenger vessel qualified and was the first of CG District to become uninspected towing vessel examiner under the new qualification procedure . . . [The applicant] . . . along with his teammates was awarded for successfully spearheading local efforts under the National Operation Big Tow initiative, in which MSU Chicago was recognized as a District expert. The unit would enjoy the fruits of this effort throughout the towboat examination process, continuing today.

- CWO2 P's statement presents a "picture of snarky, uncaring leadership who relished the ability to find a younger officer upon whom to blame and utilize as the proverbial 'whipping boy.'" The following is quoted from CWO2 P's statement:

[The applicant's] supervisor and immediate senior co-worker often criticized [the applicant] in my presence. I cannot find a reason other than difference in work styles or personalities. Maybe he was an easy scapegoat for his supervisor within the department as a way of deflecting criticism for not meeting expectations . . . [A]t the end of all the complaining, all the accusations, and all the negative commentary, [the applicant] remained a spearhead for projects in the department and continued to exhibit strong growth through qualification and personal commendation.

- The Achievement Awards given to the applicant during and upon his departure from the unit as well as his record demonstrate that the disputed OER is not indicative of the applicant's overall career, and in fact show that it was a dramatic departure from the applicant's overall performance and potential.

Applicant's OER Reply and the CO's Response

The applicant's military record contains the applicant's reply to the OER dated April 17, 2009. In his reply to the disputed OER, the applicant specifically addressed the marks of 3 in "planning and preparedness" and "using resources." He stated that he disagreed with his supervisor's opinion of his abilities. He further stated the following:

The basis for these lower than average marks is my planning of Operation Big Tow phase I and II, which was a surge operation for towboat safety and licensing that District Eight and Nine conducted in early December 2008. Operation Big

Tow Phase I was planned and based on my limited knowledge at the time about the towing industry. In my defense, I was attempting to integrate into a new department at the time and I was far from a good understanding of the regulations that govern the towing industry. However, after the first operation, I began planning Operation Big Tow Phase II. I worked very hard on this project, often developing the incident action plan at home and on weekends. I turned in several rough drafts through my supervisor for help and ideas to make it better . . . Even though phase I may not have been up to expectations, phase II was much better organized and met the intent of the operation, which was to ensure proper licensing and safety of towboats.

The supervisor and reporting officer forwarded, without comment, the applicant's reply to the reviewer, who was also the commanding officer (CO). The reviewer wrote the following response to the OER reply, in pertinent part:

While [the applicant's] current level of performance has improved from the beginning of the marking period, it was never poor. My overall opinion of this evaluation is that consistently good results observed by his supervisor were tarnished by periodic difficulties performing a very demanding job during the marking period. Two marks of "3" are representative of his overall performance this period, but below his current level of work, and well below his capabilities.

With respect to the impact of operation Big Tow; the final product was not the Command's concern, it was the lack of time management. The second phase deliverables were much better than the initial project; largely attributed to the last minute "crunch" work that went into the first phase. Marine Inspections is a very complex job, which he is taking the opportunity to excel in.

This marking period was an education for [the applicant], working for a demanding supervisor and learning to manage expectations. If his dedication continues, I am confident that he will be an asset to the Coast Guard. I fully expect [the applicant's] next OER to reflect a marked improvement and look forward to working with him in the future.

VIEWS OF THE COAST GUARD

On June 2, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion, with a memorandum from the Commander, Personnel Service Center (PSC). The advisory opinion recommended that the Board deny relief.

The JAG, citing *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992), stated that the central issue in this case is whether the applicant has shown that the disputed OER contains a "clear and prejudicial violation of a statute or regulation, or alternatively, a misstatement of a significant hard fact." The JAG noted that the responsibility for completing a fair and accurate evaluation of the applicant's performance rested with the rating chain, and that the applicant

failed to overcome the strong presumption that his rating chain officials acted correctly, lawfully, and in good faith in evaluating his performance.

The JAG stated that the evidence suggests that the rating chain properly evaluated the applicant's performance and noted that each member of the rating chain submitted a statement attesting to the accuracy of the disputed OER. The rating chain statements are discussed below.

Supervisor's Statement

The supervisor stated that the disputed OER is a true and accurate record of the applicant's performance for the period under review. The supervisor denied that the OER was hastily prepared. He further stated the following:

In a unit of approximately 27 active duty members that included only three lieutenants and three lieutenants junior grade, it is almost impossible not to know about each other's performance and lives. I witnessed [the applicant's] past performance especially since his desk was located just outside my office and in the same bullpen as all of my inspectors. I found [the applicant's] performance documented in the OER in question, not to be in line with his past performance just as he stated in his appeal. As a result of this change in performance, we met regularly in my office to discuss this change. While we knew of his family situation . . . at no time did [the applicant] indicate that his performance was affected by his daughter's condition. In fact, when the command knew of any issue surrounding his daughter's condition, the command allowed [the applicant] to be with his wife and daughter at the doctor. At no time was [the applicant] required to obtain a special liberty chit and at no time did he request any chit or special consideration.

. . . [Re]gular bullpen meeting with the staff was the norm, but closed door meetings with [the applicant] became compulsory.

As a result of [the applicant] not managing his time well, duties had to be taken from him and completed by other members of the Marine Safety Unit. I had actually spent quite a bit of time working with [the applicant] and the inspections team on this Operation Big Tow, a Coast Guard wide towing vessel examination initiative. [The applicant] was tasked to utilize his team to put together a plan for how the unit would randomly examine towing vessels on the Illinois River in the middle of winter. He had the civilian Assistant Chief of Inspections and two Warrant Officers to utilize for guidance and two petty officers to assist him with the task. He assigned his enlisted members to put together the jobs aids as he formulated the plan. The job aids were well thought out and shared throughout District 8 and District 9, however the towing vessel examination plan put together was inherently flawed as it paired two non-vessel inspectors together to go and examine vessels. As a result, at the last minute the teams had to be adjusted and additional unit level training was conducted in order to make the Operation a success.

After seeing [the applicant] struggle with the development and implementation of the Operation Big Tow plan, I felt that it would be good to provide him a chance to improve his performance and to provide him with additional assistance myself. So, [the applicant] was charged to write a team award to recognize the efforts of the unit members who implemented the Big Tow plan. I personally met with [the applicant] in order to give him the task, a timeline, the Awards Manual for guidance and a number of examples to follow in order to set him up for success. After repeatedly engaging him on the topic, requesting to see his progress and finally obtaining a substandard product I was forced to take this task from him and draft the award myself. The Meritorious Team Commendation that [the applicant] included in his package was the award that was [assigned] to him, but instead it was completed by myself and the executive officer.

Another project [the applicant] failed to properly handle was the coordination of a Federal-State-Local Law Enforcement tactical exercise. During our tour, the State Troopers were called to respond to a small boat and they requested Coast Guard assistance. After the incident, the State Troopers indicated that they were not as comfortable responding to any law enforcement issues on vessels since they interacted with them so infrequently. As a result, [the applicant] was tasked with coordinating a law enforcement training exercise for multiple law enforcement agencies . . .

With the date of the training event and field exercise approaching, the command requested to review the training and overall plan for the exercise. Unfortunately, [the applicant] had completed very little on the operation. As a result, a petty officer who was the assistant law enforcement officer and on leave at the time, had to be recalled to the office to complete a significant number of work products for the exercise. This action was deemed necessary in order to prevent the last minute cancellation of the training event and would reflect poorly on the Coast Guard . . .

These two examples clearly reflect why the two marks of 3 for planning and preparedness and for using resources were given.

The supervisor stated that he agreed with the following comments in the reviewer's response to the applicant's OER reply: "Two marks of '3' are representative of his overall performance during this period, but below his current level of work and well below his capability." The supervisor concluded his statement with the following:

Since the OER in question, I noted that [the applicant's] performance improved until we departed MSU Chicago and I sincerely hope that it continues that trend. However, his allegations that I had not "observed" him long enough, that he was not counseled on his performance, and that his OER supporting marks do not match the marks of 3 [are] completely erroneous.

Reporting Officer's Statement

The reporting officer stated that the disputed OER is an accurate assessment of the applicant's performance for the period under review. He stated that on the comparison scale in block 9 the applicant was rated as one of the many professionals who form the majority of this grade; however, "any perception that [the applicant] performed unsatisfactorily and should be rated among the approximately 10% of his peers that were 'passed-over' for promotion is incorrect." He stated that the applicant received routine informal counseling on the need "to better his performance, on daily project management, and on carrying out orders, including a scheduled meeting with the CO." The reporting officer stated that a mentor was assigned to the applicant. He stated that he talked with the applicant almost every day at work and that he had designated open door hours. Therefore, the applicant had ample opportunity during their discussions to explain any perceived deficiencies in his performance.

The reporting officer stated that CWO2 P was not in the applicant's rating chain and was not in a position to evaluate the quality or timeliness of his projects. He stated that the applicant did not obtain any professional qualifications during the period covered by the disputed OER. He also commented that there is no basis for accusations that the applicant was set up for failure by his rating chain. He stated that neither the inspections department nor its department head was the subject of any disciplinary action or bad publicity. "[T]here were no issues on which to blame anyone."

With regard to the applicant's daughter's illness, the reporting officer stated that "[t]he command provided a lot of informal consideration to [the applicant's] allocation of time away from work during his tour, including time off, adjustment of due dates, repeated edits to project deliverables, and flexible work hours."

Reviewer's Statement

The reviewer, who was also the CO, stated that the applicant is a good officer whom he likes and respects. The reviewer stated that the OER in question was one in which the applicant was assigned a project, as all junior officers are. The reviewer stated that the project was high profile and that he relied on his department head, who was the applicant's supervisor, for completion of the project and for managing his department. He stated that on many occasions, the supervisor would mention his frustration with the applicant's performance, particularly his lack of completion of assignments and follow-up. The reviewer further stated the following:

When [the applicant] first made LTJG I counseled him and one of his fellow newly promoted LTJGs. I explained my expectations of an O-2 and assigned them a mentor from my Ward Room . . . [M]y selection of a CWO to mentor JO's was unconventional, but I felt [the CWO's] CG experience and Marine Inspector qualification would be the best fit I had in a very small office to offer these young JO's the opportunity to succeed . . . The Bull pen of Inspectors had no qualified Marine Inspectors senior to [the applicant] other than the Dept. Head.

When presented with [the applicant's] OER, I reviewed for accuracy and fairness. I recommended to the [reporting officer] and [supervisor] that his marks seemed low and that I would need documentation to support such an OER. [The supervisor] working through the [reporting officer] rewrote the OER as it currently stands. My counsel was as follows: "He performed well as an Inspector Trainee and JO, he had personal challenges that we need to be sensitive to, but stumbled on several assignments and was weak in following through. I felt this JO deserved a chance and still do feel he will be an asset to the [Coast Guard]. The marks assigned were accurate as per the OER system[.] I stand behind them, or never would have signed as Reviewer. My endorsement [to the applicant's OER reply] dated 29 June 2009 clearly states my opinion and I would not change that statement.

I also have concerns [about] the witness chosen to support [the applicant's claim]. CWO2 P was not selected for promotion having earned an OER that accurately reflected his weak performance and unprofessional attitude. I will not go into line by line details to rebut his letter but can assure you, he has a self serving interest in trying to show other than factual situations while at MSU. One example is the number of persons leaving the command particularly junior officers. Fact check; Two had letters submitted before reporting to MSU, the third had started a family and chose to not transfer and stay in the area. This normal turnover does not include the 4 members who extended or returned to MSU for follow-on tours. Not exactly demonstrating the poor morale CWO2 P is trying to demonstrate . . .

PSC Memorandum

The PSC memorandum was a part of the advisory opinion. PSC offered the following opinions and conclusions based upon their review of the evidence:

- The rating chain carried out its responsibilities in preparing and submitting the applicant's OER in accordance with the Coast Guard Personnel Manual.
- The applicant was afforded counseling both during and through-out the period by both the supervisor and reporting officer.
- The member has provided no evidence that the marks in "planning and preparedness" and "using resources" were not supported.
- The applicant has failed to substantiate any error or injustice with regard to his record. He has not provided evidence that overcomes the presumption of regularity with respect to the construction or submission of the disputed OER, and there is no basis for expunging the OER. The contested OER is administratively correct and prepared in accordance with the applicable regulation.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 12, 2011, the Board received the applicant's response to the advisory opinion. He disagreed with it. The applicant stated that the crux of the advisory opinion is the JAG's comment that "[T]he applicant's argument that suggests his record was negatively impacted by the disputed OER with regard to his promotion potential is unfounded and clearly without merit." The applicant argued that this is a broad and sweeping statement, which is unsupported by any evidence proffered by the Coast Guard. The statement fails to cite anything else in the applicant's record which might result in non-selection for promotion to LT. The applicant stated that a review of his record shows that the disputed OER is the only negative document existing in his record.

With regard to the statement in the Coast Guard's advisory opinion that the "Applicant's argument that the disputed OER is aberrational is unfounded and without merit" the applicant argues that it ignores the documentation he provided. In particular, he argued that the statement does not address the fact that the disputed OER is markedly different from prior and subsequent OERs.

The applicant argued that PSC's program input relies too heavily upon the declarations obtained from the rating chain. He also argued that the PSC input fails to address "the nuances of the OER system, human error, bias, or the inflated nature of the OER system."

The applicant argued that PSC based its opinion that the applicant was counseled throughout the reporting period on the rating chain declarations, but considered none of the evidence submitted by the applicant. He argued that "[t]o limit one's opinion to only a few pieces of evidence . . . is simply unfair to [the applicant]."

With respect to the supervisor's declaration, the applicant stated that the supervisor offered no documentation or other records to support the statements made in his statement. The applicant argued that it was the supervisor's responsibility to consider the impact of the applicant's family emergency on his ability to do his job. He denied that the supervisor routinely offered guidance and stated that the supervisor relied upon events that occurred outside of the reporting period (such as the federal-state-local law enforcement tactical exercise) to justify the marks and comments in the disputed OER.

The applicant stated that the reporting officer's statements that "any perception that the applicant performed unsatisfactorily and should be rated among the approximately 10% who were not selected is incorrect" is a clear indication that the actual affect of the OER did not meet his intent and that if the reporting officer understood then what he does now, his marks would be different. The applicant also alleged that the reporting officer's goal "to run a fair and efficient command were largely disrupted by the actions of junior leaders" such as the supervisor. The applicant argued that CWO2 P's statement supports his contention in this regard. He stated that despite the rating chain attempts to discredit CWO2 P's statement, he has nothing to gain by supporting the applicant's application.

The applicant alleged that the reviewer's opinion about the applicant's performance during the reporting period "was tainted by the fact that most of his information regarding the applicant came from the supervisor, and no one else." The applicant asked the Board to consider that "[the reviewer] has the most to lose if it were discovered that members of his command were not treated fairly or given due consideration." The applicant concluded his reply to the advisory opinion with the following comments:

In writing their declarations, the three members of the chain of command had the benefit of reading the applicant's initial submission to the Board, and they appeared to not hesitate in providing statements to support their positions. We ask that the Board note that they provided nothing in the way of documentary evidence in rebutting the assertions of the applicant—except documentation of an event with no bearing on the OER in question. Logic dictates that, if the applicant were truly deserving of the low marks he received on his OER, at least one document could be produced to demonstrate his lack of aptitude.

None were provided because none ever existed. The negative comments on this OER are the result of the supervisor whose own shortcomings were projected upon his subordinates . . . contrast the tone of the supervisor with those used by the other two officers. The difference is striking, and we believe the board should take note of this.

. . . The OER cost the applicant one chance of being selected for promotion, but it was never intended to do so. In the interest of fairness, the intent of the two senior rating officials, and the intent of the officer evaluation system, we ask that you remove this "career killer" from the official file of [the applicant].

Other Submissions from the Applicant

On September 1, 2011, the Board received additional documents from the applicant that included his statement with endorsement to the PY 2010 LT selection board, his designation as suspension and revocation investigator, and his above average OER for the period February 1, 2011 to June 30, 2011.

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 section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. For the reasons discussed below, the Board finds that the applicant has failed to prove an error or injustice in the disputed OER.

4. As the advisory opinion stated, to establish that the disputed OER is erroneous and should be removed from his record or modified, the applicant must prove that it contained a significant misstatement of hard fact or that it was prepared in violation of the law or regulation. The applicant's argument that the OER is in error or unjust because it is allegedly "aberrational and not consistent with his overall performance" is not proof that the disputed OER is erroneous. In fact, the Personnel Manual states that in evaluating an officer, "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." In addition this provision states that the supervisor shall review the reported-on officer's performance and qualities *observed and noted during the reporting period*. Therefore, the marks on the applicant's prior or subsequent OERs are not a proper basis on which to decide whether the disputed OER is erroneous or unjust.

5. The applicant next alleged that the disputed OER does not include an evaluation of his performance for the entire reporting period because the supervisor was not a member of his rating chain until the last 4 months of the reporting period, and therefore, only observed his performance for 4 months. The Board is not persuaded by this argument. Although the Personnel Manual does not require the rating chain supervisor to be in place for any specific portion of the reporting period, it provides safeguards to ensure that a reported-on officer receives a thorough evaluation. First, the regulation gives the reported-on officer the opportunity to provide the supervisor with "a listing of significant achievements or aspects of [his] performance which occurred during the reporting period." See Article 10.A.2.c.2.e. of the Personnel Manual. There is no indication in the record whether the applicant took advantage of this opportunity, but he did not argue that any of his accomplishments during the reporting period were omitted from the disputed OER.

Second, in preparing the disputed OER, the supervisor could draw from not only his own observations, but from those of any secondary supervisors and other information accumulated during the reporting period. Article 10.A.4.c.4.d. of the Personnel Manual. The supervisor could have obtained information on the applicant's performance from his other supervisors during the reporting period, as well as from the reporting officer. In addition, the supervisor stated in his declaration that because the command had only 27 active duty members, it was impossible not to know about each other's performance. Therefore, while the supervisor may not have been on the applicant's rating chain for the entire reporting period, the evidence of record is that he was aware of the applicant's performance for the entire reporting period. As stated above, the applicant has not argued that any significant accomplishment during the reporting period was omitted from the disputed OER.

Third, the applicant had the right to submit a reply to the OER, which he did. In his reply, he explained his view of his performance for the period under review. The OER, reply, and reviewer comments are available to all who review the applicant's record.

6. The applicant argued that the comments supporting the marks of 3 in "planning and preparedness" and "using resources" are vague and offer no quantifiable evidence that he

deserved less than a 4 or 5 in these dimensions. The comments that support the marks of 3 read as follows: “Characteristic project/time management difficulties of first tour junior officer, strained to balance own [training] requirements w/high paced operational billet . . . “ [and] “supervisors were forced to repeatedly prompt [member] to meet deadlines and expectations.” The comments are not vague and they are sufficiently clear to explain why the applicant was given a 3 in “planning and preparedness” and “using resources.” In addition, the applicant did not explain what about the comments confused him or what about them he failed to understand. His argument that the comments required quantifiable evidence is not supported by the OER regulation. Article 10.A.4.c.4.d. of the Personnel Manual states that after marking each evaluation area, the supervisor shall include comments on specific aspects of the reported-on officer’s performance and behavior for each mark that deviated from a four. The supervisor complied with the regulation by providing comments to support the 3s in “planning and preparedness” and “using resources.” Under the regulation, there is no set number of examples that must be given to support a mark.

Moreover, the supervisor explained in his declaration that, in addition to Operation Big Tow, there were at least two other instances in which the applicant failed to manage his time so that the assigned projects would be completed on time. One involved the applicant’s writing of the team award to recognize the efforts of the unit’s members for Operation Big Tow and the other coordinating a federal-state-local law enforcement tactical exercise. Although the applicant argued that federal-state-local exercise occurred in another reporting period, the disputed OER indicates that it occurred during that reporting period because in the comment block to section 3. of the disputed OER, the supervisor wrote the following: “[Reported-on officer] coord. Interagency training w/CBP, state & fed. LE agencies on U.S. Laker to increase agencies familiarity w/large VSIs & how to respond in case of issues resulting in increased interoperability among several LE agencies.” The evidence supports concluding that the applicant was aware of the basis for the marks of 3.

7. Similarly, the applicant argued that the reporting officer’s comment that “[the applicant] has struggled to balance work-life w/high op-tempo of a dynamic field unit” in section 7 was vague and not quantified. The comment is not vague and the regulation does not require that the rating chain produce any specific number of examples to support a comment evaluating an officer’s performance. Furthermore, section 7 is where the reporting officer supplements or amplifies the supervisor’s evaluation. The reporting officer agreed with the supervisor that the applicant had issues with balancing his work and life in a high tempo environment. As the executive officer for the command, the reporting officer had the opportunity to observe and become familiar with the applicant’s performance. He affirmed the disputed OER as written.

8. The applicant has not submitted sufficient evidence to prove that the supervisor’s and reporting officer’s comment about difficulty with time management is inaccurate. CWO2 P’s statement that the applicant “was often handed short-fused projects with little assistance or guidance from supervisors or peers and consistently produced a quality, timely product for the department and the command” is not persuasive. CWO2 P mentioned Operation Big Tow as one of the high profile projects the applicant completed. However, as the reviewer stated in his response to the applicant’s OER reply, the issue was not the final product, but the applicant’s “lack of time management.” CWO2 P’s statement contains no evidence, except for his assertion,

that the applicant's "time-management" was not a problem during the planning of Operation Big Tow or at other times during the reporting period. Even the applicant tacitly admitted in his OER reply that he had issues with the project. In this regard, he wrote in that reply that "I was attempting to integrate into a new department at the time and I was far from a good understanding of the regulations that govern the towing industry. . . . Even though phase I may not have been up to expectations Phase II was much better organized. . . ." In addition, the supervisor wrote in his declaration with regard to Operation Big Tow that at the last minute teams had to be adjusted and additional unit level training was conducted in order to make the operation a success. He also stated that it became necessary for him to complete the citation for the Team Award for Operation Big Tow, even though the applicant was assigned that task. Evaluating the applicant's performance was the responsibility of the rating chain, and each member has affirmed that the disputed OER is accurate. CWO2 P's statement is insufficient to prove that it is inaccurate.

9. Regarding the section 9 comparison scale mark, the applicant argued that it is inconsistent with the reporting officer's marks of 4s and 5s and the description of his potential in section 10. According to Article 10.A.4.c.8. of the Personnel Manual, the section 9 mark represents the reporting officer's ranking of the reported-on officer relative to all other officers of the same grade the reporting officer has known. This provision further states that the comparison scale mark represents a relative ranking of the reporting officer and not necessarily a trend of performance. Apparently, in evaluating the applicant for the period under review, the reporting officer rated the applicant in the lowest of the three blocks that formed the category "one of the many competent professionals who form the majority of this grade." Since the mark represents the reporting officer's evaluation of the applicant when compared to other LTJGs he has known, it is not rendered erroneous or inaccurate because the applicant may have had a different ranking in previous or subsequent OERs. If support were needed for this mark, which it is not, the Board notes that both the supervisor and reporting officer commented on the applicant's failure to manage his time in the disputed OER, which supported the marks of 3 in "planning and preparedness" and "using resources." Therefore, the Board finds that the section 9 mark represents the reporting officer's evaluation of the applicant compared to other LTJGs he has known throughout his career; that it is not inconsistent with the remainder of the disputed OER; and that the applicant has not submitted sufficient evidence to prove that the mark is erroneous or unjust.

10. The applicant's contention that he received no written or verbal counseling is rebutted by members of the rating chain and the disputed OER. The supervisor stated that he met regularly with [the applicant] in his office to discuss his performance. The reporting officer wrote that "[a]lthough no formal counseling was documented, [the applicant] received routine informal counseling on the need to better his performance on daily project management and carrying out orders, including a scheduled meeting with the commanding officer . . . and a formal mentor was assigned . . ." The reporting officer commented on counseling provided to the applicant in section 7 of the disputed OER. In this regard he wrote "[Reported-on officer] counseled on the professional challenges ahead; while performance satisfactory, it is neither exceptional nor consistent." The reviewer, who was the CO, stated that the applicant required numerous counseling sessions in order to complete assigned tasks in an acceptable manner." Even CWO2 P wrote that the CO assigned him to mentor the applicant because the CO was not

pleased with the speed at which the applicant was progressing. Therefore, the record shows that the applicant did receive counseling or feedback on his performance. According to 10.A.1.c.5. of the Personnel Manual, no specific form or forum is prescribed for performance feedback, which may occur whenever a subordinate receives advice or observations related to their performance in any evaluation area. In addition, the reported-on officer is responsible for seeking clarification if the feedback he receives is not understood.

11. The applicant argued that the reporting officer's comment that the applicant had difficulty in managing a proper work/life balance in a high tempo environment is evidence that the reporting officer failed to take into account his family's pressing medical issue during the reporting period. The applicant's family medical issue is something that the rating chain could have considered in evaluating the applicant's performance, but there is nothing in the provisions of the Personnel Manual relating to OERs that require the rating chain to take family medical issues into consideration. The Personnel Manual does provide guidance with respect to a reported-on officer's inability to perform fully due to a medical condition or illness. Even so, the reporting officer wrote in his declaration that "[t]he command provided a lot of informal consideration to [the applicant's] allocation of time away from work during his tour, including time off, adjustment of due dates, repeated edits to project deliverables, and flexible work hours." The applicant has not shown that adjustments were not made by the rating chain to accommodate his family illness for the period under review.

12. The applicant argued that the OER should be removed or modified because the reporting officer and reviewer comment that "any perception that the applicant performed unsatisfactorily [during the reporting period] and should be rated among the approximately 10% of his peers that were 'passed over' for promotion is incorrect" shows that the OER does not accurately represent their intention regarding the applicant's career. In contrast to the applicant's interpretation of this comment, the Board interprets it as meaning that the OER is an honest assessment of the applicant's performance for the period under review and not an assessment of the applicant's entire career. In addition, the Board finds that the comment expresses the reporting officer's and reviewer's opinion that the OER is not an evaluation of unsatisfactory performance. The Board notes that each member of the rating chain stated in declarations to PSC that the OER was an accurate assessment of the applicant's performance for the period under review.

13. The Board is not persuaded that the OER is erroneous or unjust because the applicant, along with others, received a Team Commendation Award for Operation Big Tow or because the applicant received the Coast Guard Achievement Award at the end of his tour. The team award was not an individual award but recognized the members of the team for a job well done. It does not single out the applicant for the success of Operation Big Tow. Therefore, it does not disprove the rating chain's comment that the applicant encountered time management problems during the period under review. The Achievement Medal covered the applicant's entire tour at the unit from February 2007 to June 2010. He had some notable achievements during the period, but that does not disprove the rating chain's marks and comments in the disputed OER that he encountered some difficulty managing his time. The CO recognized in his response to the applicant's OER reply that the applicant's performance during the period covered by the disputed OER was below that of his capability and that he expected to see marked improvement,

if the applicant remained dedicated. Therefore, the fact that the applicant improved, as his CO expected, and was rewarded with an end of tour Coast Guard Achievement Medal does not disprove that for the specific period under review he encountered problems as noted in the disputed OER.

14. The applicant's contention that he was deliberately given the disputed OER to deflect criticism away from his supervisor's shortcomings is not supported by the record. The only evidence offered in this regard is CWO2 P's speculation that this occurred. However, he offered no specific evidence to support his allegation. The reporting officer stated there was no need to deflect any criticism because neither the inspections department nor its department head was the subject of any disciplinary action or bad publicity.

15. The applicant's argument that the supervisor had not presented any documentation to support statements made in his affidavit is noted. However, the rating chain members are presumed to have performed their duties in accordance with the regulation. It is the applicant's responsibility to prove error or injustice in his record by a preponderance of the evidence. He has failed to do this.

16. The applicant has failed to prove an error or injustice in the disputed OER; therefore, there is no basis on which to consider removing the applicant's failure of selection for promotion to LT. Before the Board can reach the issue regarding the removal of a failure of selection for promotion, the applicant must first establish a prejudicial error or injustice in the OER. *See Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982). The applicant had not done so.

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

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Anthony C. DeFelice

Frank E. Howard

Jeff M. Neurauter