

**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. 2004-115**

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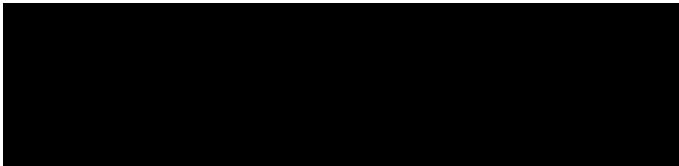
**DECISION OF THE GENERAL COUNSEL  
AS THE DELEGATE OF THE SECRETARY**

I approve the recommended Final Decision of the Board.

I disapprove the recommended Final Decision of the Board.

I concur in the relief recommended by the Board.

Date: March 11, 2005



Joe D. Whitley  
General Counsel  
as delegated to act on behalf of the  
Secretary of Homeland Security

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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. It was docketed on May 7, 2004, upon the BCMR's receipt of the applicant's completed application. The Coast Guard submitted an advisory opinion for the case on October 7, 2004. The applicant was granted a one-week extension of the time provided for responding to the advisory opinion and submitted his response on November 11, 2004.

This final decision, dated February 10, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST**

The applicant asked the Board to remove three officer evaluation reports (OERs) covering his performance from April 1, 1999, to September 30, 1999; from October 1, 1999, to January 31, 2000; and from February 1, 2000, to May 21, 2000,<sup>1</sup> which he received while serving as a lieutenant junior grade (LTJG) and engineering officer in training (EOIT) aboard the cutter *Xxxxxx*. The applicant alleged that his numerical marks in those OERs were erroneously downgraded because his commanding officer

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<sup>1</sup> The applicant previously challenged just one numerical mark in the third disputed OER in BCMR Docket No. 2001-094. He alleged that the mark of 3 he received for "Health & Well-Being" should have been a mark of 5. (Officers are evaluated in various performance categories on a scale of 1 to 7, with 7 being best.) The Board denied relief, noting that the mark of 3 was supported by a written comment that he had been four hours late to work one day because of his misuse of alcohol. Because the applicant alleged that he did not learn that the CO had directed his reporting officer, LCDR D, to lower his OER marks until March 2002, the Chair found that the application met the Board's rules for reconsideration under 33 C.F.R. § 52.67.

(CO), who served as the reviewer of the disputed OERs,<sup>2</sup> was irrationally biased against him and ordered his supervisor and reporting officers to downgrade the marks, in violation of the Personnel Manual.

The applicant alleged that, as a result of the erroneous OERs, he was passed over for selection to lieutenant (LT) by the selection board that convened on September 23, 2002, when he was “in the zone” for selection. He alleged that 95% of the officers considered “in the zone” for promotion by that selection board were selected for promotion and that, but for the erroneous OERs in his record, he would have been selected as well and promoted to LT on October 29, 2002. The applicant noted that because he was selected for promotion by the next LT selection board, which convened on September 22, 2003, he was not promoted to LT until January 16, 2004—more than a year later than he would have been but for the erroneous OERs in his record. Therefore, he asked the Board to backdate his date of rank to what it would have been had he been selected for promotion by the selection board that convened on September 23, 2002, and to award him all back pay and allowances.

Finally, the applicant asked the Board to order the Coast Guard to process a proposed decoration that had been initiated by his supervisor as if it had been approved by his CO.

### APPLICANT’S ALLEGATIONS

The applicant alleged that almost immediately after the new CO reported aboard the *Xxxxxx* on July 10, 1999, she “developed an irrational and fixed dislike” for him. He alleged that “she made no effort to hide the feelings and, indeed, openly expressed them to [him] and other members of the wardroom and crew.” He alleged that she “constantly insulted, berated, and mistreated” him and “was simply incapable of fairly and accurately evaluating his performance.” The applicant alleged that the rest of the officers and crewmembers—including his supervisor and reporting officer—held him in high regard. However, contrary to Article 10.A.2.f.2. of the Personnel Manual, the CO “expressly ordered [his] supervisor and reporting officer to downgrade their numeric ratings and comments on three of his OERs.” He alleged that they complied only because they were under threat of retaliation in their own OERs, which the CO would prepare. Therefore, he argued, the disputed OERs “do not fairly and accurately reflect his performance.”

The applicant alleged that his CO was biased against him because he is an Italian male and confident in his leadership. He alleged that she sometimes called him “Spicoli” in reference to “the dimwitted surfer character in the movie *Fast Times at Ridge-*

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<sup>2</sup> Officers are evaluated by a “rating chain” of superior officers, including a supervisor and a reporting officer (normally the supervisor’s supervisor), who assign numerical marks in the various performance categories and prepare the written comments, and a reviewer, who reviews the OER for accuracy and consistency.

mont High.” He alleged that she was also biased against another Italian officer—the Executive Officer (XO) who served as his reporting officer for the first disputed OER—whom she relieved of command for alleged insubordination in December 1999. He alleged that the XO filed an Equal Employment Opportunity (EEO) complaint.<sup>3</sup>

The applicant alleged that his CO tried to inhibit his career by, for example, refusing to qualify him as deck watch officer even though he had completed the requisite tasks and was regarded as “the best ship-handler among the junior officers.” He complained that she also refused to recognize his significant contributions in responding to and mitigating a serious flood in the cutter’s main engine room in February 2000. He alleged that she praised others’ responses even though he had taken charge and averted an ineffective response. He alleged that his supervisor, the Engineering Officer (EO), drafted a personal award for him for his response to the flood but the CO refused to approve it. He asked that the Board order the Coast Guard to process this award recommendation as if his CO had approved it.

The applicant alleged that in February 2001, about thirteen months after the CO removed the first XO, she also removed his supervisor, the EO. Although the Operations Officer (OO) had suffered a heart attack and was also not on board, the CO deployed on a law enforcement patrol without an EO or OO. When her chain of command discovered this, she was ordered to abort the mission and her command initiated a command climate assessment. The applicant noted that that after this assessment, the CO retired even though she had been selected for promotion from commander to captain and had not yet been appointed. He alleged that “[e]xperience suggests that she was ‘invited’ to retire.”

The applicant alleged that the disputed OERs are “so pervasively tainted” by the CO’s irrational bias that “it would be impossible or impractical to isolate and redact specific incorrect or unjust material. Therefore, he asked that they be removed entirely and replaced with continuity reports.

Finally, the applicant alleged that the disputed OERs clearly prejudiced his record before the LT selection board as they were substantially worse than the OERs he would have received in the absence of his CO’s bias. He argued that an OER “is the single most important document in the selection [board’s] folder, citing *Brooks v. United States*, 213 Cl. Ct. 115, 120 (Cl. Ct. 1977), and *Skinner v. United States*, 594 F.2d 824, 831 n.4 (Ct. Cl. 1979). Moreover, he argued that once the Board has found an error in a record, “the government bears the ultimate burden to demonstrate that the error was harmless.” He argued that “[i]n the context of a promotion case, like this one, ‘[t]he harmless error test places on the [Coast Guard] the burden of producing substantial evidence to demonstrate it would be unlikely that a service members would ... have

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<sup>3</sup> The applicant alleged that the Coast Guard settled the XO’s case and removed an OER from the XO’s record and promoted him from lieutenant commander to commander. The applicant attached a copy of the decision of the Personnel Record Review Board (PRRB), which removed the XO’s OER.

been promoted ... regardless of the government error.' *Golding v. United States*, 48 Fed. Cl. 697, 739 (2001), *aff'd mem.*, 47 Fed. Appx. 939 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1303 (2003); *see also Christian v. United States*, 337 F.3d 1338, 1344 (Fed. Cir. 2003)."

## STATEMENTS SUBMITTED BY THE APPLICANT

### *Statement by the Engineering Officer, LT D*

LT D, who served as the applicant's supervisor for the marking periods of all three disputed OERs, stated that the applicant was a "very capable officer with great potential." LT D stated that soon after arriving on board, the CO told him that the applicant was "a problem that needed to be fixed." He stated that it was clear that the CO did not like the applicant "on a personal level" and "was incapable of drawing a line between her personal and professional opinion of him." He noted that the CO had been removed from his own rating chain because the Area Commander, a Vice Admiral, was concerned about "her inability to fairly evaluate me after some serious issues with the way she had run her command had been brought to light."

LT D stated that "[s]omewhere in the chain of command, several of [the applicant's] evaluation marks in my portion of the evaluation were lowered for the period ending 30 September 1999" (the first disputed OER). He alleged that LCDR D, the reporting officer and XO of the *Xxxxxx*, told him to discuss it with the CO. The CO told him that the marks he assigned had been lowered because the written comments he had provided did not support them. LT D stated that he had the same problem when preparing the applicant's next two OERs in that several of the marks he assigned were lowered. He stated that he complained to the new XO, LCDR B, but he would not allow him to discuss the matter with the CO. He stated that he believed that, in lowering the marks he had assigned, the XOs or CO had violated Article 10.A.2.f.2. of the Personnel Manual.

LT D further stated that, although the CO told him several times that the applicant was the "best ship handler amongst the junior officers aboard the ship," she also said that "she would never qualify him as a deck watch officer aboard her ship, no matter how long he remained on the bridge." LT D stated that the CO made it clear to the officers in the wardroom that she disliked the applicant. He stated that the applicant was often the butt of her jokes.

LT D stated that once, at 3:00 a.m., the *Xxxxxx* "suffered from a faulty shaft seal that allowed seawater to rapidly begin filling the ship's engine room." The ship was in homeport and moored, but only a few of the 20 crewmembers on board were awake. The applicant awoke due to a commotion on deck and "as the senior engineering department representative aboard, took charge of the damage control efforts. He directed sounding the general alarm to awaken the sleeping crew, set up emergency dewatering, and coordinated the inflation of the emergency shaft seals. His efforts

ensured that no machinery was damaged and no personnel were injured." LT D stated that, although he recommended the applicant for an Achievement Medal, the CO refused to sign the recommendation. She told him that she "would not sign an award for [the applicant] so close to the end of his tour because it would appear he was being awarded an end of tour award and she felt he didn't deserve one." The next morning, the CO congratulated the crew on their response to the emergency and singled out certain individuals but did not mention the applicant.

### *Statement by the Executive Officer, LCDR D*

LCDR D, the XO of the *Xxxxxx* from June 1998 to December 1999 and the reporting officer for the first disputed OER, stated that the applicant was a "highly competent, intelligent and superlative performer" who was also "extremely affable." He stated that the CO "expressed a strong dislike for [the applicant] immediately upon assuming command" in July 1999. He stated that at their initial meeting, she told him that she was "generally pleased with the caliber of the Junior Officers in the wardroom with the exception of [the applicant]." He stated that the CO was "incapable of accurately, fairly and objectively evaluating" the applicant "due to her expressed, intense personal dislike of him." He stated that while he was working on the applicant's OER for the period ending September 30, 1999, the CO "ordered [him] to lower several of the marks and then to change the supporting language to support the lower marks. [He] specifically remember[s] her ordering me to lower the marks in professional competence, directing others, teamwork, judgment and professional presence, among others. During [the] discussions, [he] was able to persuade her to rescind her order to lower some marking areas but not others."

LCDR D stated that he himself had personally experienced the CO's inability to provide accurate and fair evaluations. He stated that as soon as she reported aboard, the CO "engaged in a systematic effort to remove [him]" as XO and "drafted an untruthful, derogatory evaluation," which was later removed by the Personnel Record Review Board.<sup>4</sup>

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<sup>4</sup> The applicant submitted a copy of the PRRB's decision in the XO's case. The decision indicates that the XO alleged that the CO assumed that he "was incapable of following orders from her because he was an Italian-American man. Every action, spoken word, and non-verbal communication he made as XO ... was unfairly viewed through this discriminatory lens." The evidence to the PRRB included a statement from someone who "testified that the CO stated that the XO could not take orders from a woman because the XO was an Italian-American man" and evidence that the CO and another officer "speculated whether the XO's heritage kept him from accepting orders from a senior female officer." Other evidence indicated that the XO's reviewer later told him to file an EEO action and a BCMR application, which "will probably be approved" because of new information that had come to light about the leadership style of the CO and the "unfortunate situation onboard the [cutter] from 99/07/10 to 99/11/30." The PRRB concluded that, although the XO did not adequately prove he was discriminated against because of his heritage, he deserved relief "in so much that the environment in which he worked was less than adequate, led to a hostile environment with his Commanding Officer, and ultimately resulted in the Applicant's removal from the unit and the subsequent OER."

***Statement by the Operations Officer, LT E***

LT E stated that the applicant as a “solid performer” who met “all watchstanding and qualification expectations.” He stated that the applicant “was a very likable and personable young man who enjoyed the respect and support of the crew. He was respectful at all times and practiced proper customs and courtesies.” He stated that the CO did not approve of the applicant’s personality and “therefore had difficulty in evaluating him solely on his performance.”

LT E stated that the CO would berate the applicant and other junior officers during meals in the wardroom. He stated that the CO treated the applicant like a child and once asked him not to eat in the wardroom, but later made a “large deal” about the fact that he was absent from the wardroom. As a result of such treatment, LT E stated, the applicant rarely ate in the wardroom toward the end of his tour.

***Statement by LT G***

LT G stated that upon reporting aboard the *Xxxxxx* in August 1999, he realized that the CO had a “deep personal dislike” for the applicant. He stated that she singled the applicant out at mealtimes, always second-guessed his work, and made derogatory comments about him. LT G stated that during meals the CO would “frequently frown at [the applicant] and tell him to ‘shut up’ or ‘that’s enough [applicant’s first name]’ in a very condescending tone.” LT G stated that he “never observed behavior [by the applicant] that would warrant the ill treatment” he received from the CO. He stated that she “could [not] possibly be objective in evaluating” the applicant.

LT G stated that although the applicant completed all qualifications for becoming a deck watch officer, the CO would not allow him to sit for the qualification board and said that he would never get to while she was on board.

LT G stated that the CO had the same personality conflict with LCDR D, the XO. He alleged that the CO “felt threatened or uncomfortable around competent and confident leaders, especially males.” LT G also stated that the applicant had been highly regarded by the previous command of the *Xxxxxx* and “this was a very negative thing in [the CO’s] eyes” because she strongly disliked the previous command. LT G stated that the CO unfairly relieved the XO from his position.

***Statement by LT M***

LT M, who also served in the Engineering Department, stated that the applicant was “highly competent, professional and effective in the discharge of his duties.” He stated that soon after he reported to the *Xxxxxx* in 1999, he noticed that the CO had a

“strong personal dislike” of the applicant and “took advantage of opportunities to demonstrate her bias against him.”

LT M stated that during the flood of the engineering room, the applicant was primarily responsible for averting severe damage. Although the duty section received praise and several individuals were singled out, the CO did not mention the applicant. LT M stated that he took this to be a direct insult to the applicant and some crewmates made comments to him indicating that they agreed with his assessment of her response.

LT M stated that, in the wardroom, the CO frequently belittled the applicant, called him ‘stupid,’ or would ask him to leave. He stated that “her abuse was so frequent that it began to seem ‘normal’” but that it was “unprofessional and bordering on irrational.”

*Statement by the Administrative Officer, LT T*

LT T stated that as soon as she assumed command, the CO “took an obvious personal dislike” to the applicant. “She was much harsher in her criticism; she frequently mocked him—both in and out of his presence—and it was clear to the whole crew that she did not like him personally. During meals it seemed she went out of her way to make things unpleasant for [the applicant].” LT T stated that the CO seemed to associate the applicant with the XO and the prior CO, whom she very openly disdained. LT T stated that the CO’s treatment of the applicant was “unprofessional and unwarranted” and that he does not believe she could have been capable of objectively evaluating him.



### *Statement by LTJG C*

LTJG C stated that he served on the *Xxxxxx* in 1999 and 2000. He stated that the CO "treated [the applicant] unfairly on many occasions. She often made it clear to the other officers in the wardroom, that [his] presence was not welcome" and "always made inappropriate comments both in [his] presence and in his absence. If he didn't join the wardroom during the daily meals, [the CO] would immediately let the rest of the wardroom know that she [would] rather not have his company during meals, and on more than one occasion made remarks to the entire wardroom to the effect of 'if I had my way, [the applicant] would be kicked out of the Coast Guard."

LTJG C also stated that the CO impeded the applicant's qualification as under-way officer of the deck (OOD). He stated that the CO announced at an evening meal that the applicant could not qualify even before he started the training. He stated that "it was clear that [the CO] was not going to give him a chance to qualify." LTJG C stated that the CO felt threatened by confident men and "had difficulty in getting the crew she commanded to follow her." He stated that she resented it when she saw the crew "respect and follow one of her junior officers more than they did herself." He stated that he overheard the CO say to another female officer, "They're men, if you don't yell, they don't listen."

### *Statement by DCC M*

DCC M, who worked for the applicant on the *Xxxxxx*, stated that he "was an excellent leader and ran a very successful division. He kept up morale and helped us maintain focus despite working under a very hostile command." He stated that the applicant "overhauled the training system and oversaw a reorganization of the training teams." DCC M noted that the cutter won a "Battle E" ribbon for damage control excellence due to the applicant's efforts as damage control assistant.

DCC M stated that he was "aware of a general animosity of [the CO] towards [the applicant], but [he] could not see any reason for this attitude. She frequently singled him out for ridicule and failed to acknowledge his noteworthy accomplishments." DCC M stated that the applicant was a "great leader of the [damage control] division" and that based on his "performance and general demeanor as a junior officer, [DCC M could] see no reason as to why he was treated so poorly by [the CO]."

### *Statement by EM1 K*

EM1 K, who served in the Engineering Department on the *Xxxxxx*, stated that the applicant was a helpful leader who "put a great amount of energy and professionalism in training the crew to respond to ships casualties." However, when the CO reported aboard, her "new policies dealing with both operations and general shipboard life had a very negative effect on the crew." He stated that morale became very low and

the crew seemed "beat down." He stated that the applicant never complained about the CO but that there were rumors she was treating him very unfairly.

### *Statement by FS3 M*

FS3 M stated that he set up and served the meals in the wardroom. He stated that “[o]n numerous occasions, [he] would overhear [the CO] degrade and belittle [the applicant], even to go as far as saying that he ‘wasn’t worthy of being n the Coast Guard.’ ... It seemed she was constantly picking on him. ... It was common knowledge to the whole crew how much animosity she felt toward him.” FS3 stated that while being trained by the applicant in damage control, he determined that the applicant was “professional, knowledgeable, and very effective as a leader. As far as [he] could see [the applicant] observed proper courtesies and was well respected by the crew and other officers. To the best of [his] knowledge, there was never any reason to warrant the way he was treated.”

### **SUMMARY OF THE RECORD**

On May 20, 1998, the applicant was commissioned an ensign upon graduating from the U.S. Coast Guard Academy. He reported to the *Xxxxxx* on June 24, 1998, and served as an engineering officer in training (EOIT) and damage control assistant (DCA). His rating chain for his first two OERs—which covered his service from May 20, 1998, to September 30, 1998, and from October 1, 1998, to March 31, 1999—gave him good comments and recommendations for promotion and the good numerical marks shown in the first two columns in the table below (OERs 1 & 2). This first rating chain included LCDR D—the XO—as his reporting officer.

In the summer of 1999, the applicant’s rating chain changed, as the *Xxxxxx* received a new EO and CO, who would serve as his supervisor and reviewer, along with his reporting officer, LCDR D. On the first disputed OER, which covered the applicant’s service from April 1 to September 30, 1999, he received good comments and the numerical marks shown in the table below (OER 3). LCDR D noted his selection for promotion to LTJG and highly recommended him for promotion to LT with his peers. On November 20, 1999, the applicant was promoted to LTJG.

On the second disputed OER, which covered the applicant’s service from October 1, 1999, to January 31, 2000, he again received good comments and a recommendation for promotion to LT with his peers. The numerical marks he received in this OER (OER 4) appear in the table below. As the CO had removed LCDR D from his position as XO, a new XO, LCDR B, served as the reporting officer for this OER.

On April 10, 2000, the CO counseled the applicant and documented his first “alcohol incident.” The required documentation states the following:

1. On 23 March 2000, you arrived over two hours late to your duties as inport Engineering Officer of the Watch (EOW) ... . By your own admission, your consumption of alcohol the night before was a major contributing factor in your inability to perform your

appointed duties at the prescribed time. Because of your tardiness, another EOW had to cover for you until you arrived.

2. In accordance with [Article 20.A.2.d. of the Personnel Manual], since alcohol was a causative factor in your inability to perform your assigned duties, I determined that this was an alcohol incident and directed you to be screened for alcohol abuse on 27 March 2000 at the UTMB Primary Care Facility.

3. The report of evaluation stated your alcohol abuse was episodic, but non-dependent. Therefore, you are directed to attend a minimum of six alcohol abuse counseling sessions during the next inport. Also, you are hereby counseled that any further alcohol incidents may be justification for your dismissal from the service.

The third disputed OER<sup>5</sup> covered the applicant's service from February 1, 2000, until the end of his tour on the Xxxxxx on May 21, 2000. On it, he received some good comments, including several about his primary responsibility for the correct handling of the flooding of the engineering room, which "could have been catastrophic if not for his quick actions." However, he also received lower marks (see OER 5 in the table below) and the following comments by the supervisor: "Listened well, but often missed intended msg"; and "Displayed cavalier attitude when late for duty ... Did not take off-going EOW's time into consideration." Moreover, the reporting officer, LCDR B, wrote the following:

- "[Performance] has declined this marking period mainly due to his inattention to detail, lackadaisical attitude & lack of professionalism."
- "[A]t times, has been unable to focus on task at hand. Counseled numerous times on his lack of maturity & leadership, but has chosen to ignore the advice given. [He] has the ability, but he has not fully utilized it to date."
- "Uniform appearance below standard during pers insp ... Set bad example for crew. Prof demeanor lacking in several dif situations ... Not aligned w/ command philosophy."
- "Failed to use alcohol responsibly & as a result reported 4 hours late for work on duty day ... 1<sup>st</sup> alcohol incident."
- "[He] has the potential to be a very good officer but fell well short of that potential this marking period. Extremely Knowledgeable/competent DCA but inability to focus has greatly diminished his ability to perf at high lvl he is capable of. Hopefully, [he] has learned some basic lessons during this tour, which will make him a better officer & leader in the future. However, I cannot recommend him for promotion to LT at this time due to his lack of basic leadership skills. Recommended for staff assignment in the marine safety or civil eng fields."

The applicant did not exercise his right to submit replies to any of the disputed OERs. Upon completing his tour on the Xxxxxx in May 2000, the applicant was trans-

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<sup>5</sup> See footnote 1 above.

ferred to Coast Guard Headquarters, where he became a project officer for the National Distress & Response System Modernization Project/Rescue 21 Acquisition Project. In his first four OERs in this position, he received good comments and recommendations for promotion to LT and the marks shown in the table below (OERs 6, 7, 8 & 9). The fourth of these OERs stated that he was “[s]trongly recommended for promotion to LT w/ the best of peers.” He also received a Letter of Commendation, which is noted in OER 6. However, he was not selected for promotion by the LT selection board that met in September 2002, when he was “in the zone.” Of those 517 LTJGs who were “in the zone,” 489, or 95%, were selected for promotion to LT.

For his work as a project officer, the applicant received a fifth evaluation (OER 10), with good comments and a strong recommendation for promotion, on January 31, 2003. He received a Team Meritorious Commendation Medal on January 13, 2003. On February 1, 2003, he became the Implementation Team Leader for the Rescue 21 Acquisition Project, and he received another good evaluation (OER 11) for this work on June 30, 2003. The applicant was selected for promotion to LT in 2003, and he was promoted on January 16, 2004. The numerical marks he received on these OERs appear in the table below.

**APPLICANT’S MARKS IN ELEVEN OERs FROM 5/20/98 THROUGH 6/30/03**

<b>CATEGORY<sup>a</sup></b>	<b>OER 1</b>	<b>OER 2</b>	<b>OER 3</b>	<b>OER 4</b>	<b>OER 5</b>	<b>OER 6</b>	<b>OER 7</b>	<b>OER 8</b>	<b>OER 9</b>	<b>OER 10</b>	<b>OER 11</b>	<b>AVE<sup>b</sup></b>
Planning & Preparedness	5	5	5	5	4	4	4	5	5	5	6	<b>4.9</b>
Using Resources	4	4	5	5	4	4	4	5	5	6	5	<b>4.6</b>
Results/Effectiveness	4	5	5	5	4	5	4	5	6	6	6	<b>5.1</b>
Adaptability	4	5	5	5	4	4	4	5	5	5	6	<b>4.7</b>
Professional Competence	5	5	6	6	5	4	4	5	5	5	6	<b>4.9</b>
Speaking & Listening	4	4	5	4	4	5	5	5	5	5	6	<b>4.9</b>
Writing	4	4	4	4	4	4	4	5	5	5	5	<b>4.5</b>
Looking Out for Others	4	4	6	4	4	4	4	5	5	5	5	<b>4.5</b>
Developing Subordinates	4	5	6	6	5	4	4	4	5	5	5	<b>4.5</b>
Directing Others	5	5	4	4	4	5	4	5	5	6	6	<b>5.1</b>
Teamwork	5	6	4	4	4	5	5	6	6	6	7	<b>5.7</b>
Workplace Climate	4	4	5	5	4	4	4	5	6	5	5	<b>4.6</b>
Evaluations	4	4	5	4	4	4	4	4	5	5	5	<b>4.4</b>
Initiative	6	6	5	5	4	4	5	4	7	6	6	<b>5.5</b>
Judgment	4	5	5	5	4	5	4	5	5	6	6	<b>5.0</b>
Responsibility	4	5	6	5	3	4	5	5	6	6	6	<b>5.1</b>
Professional Presence	4	4	4	4	3	5	5	5	5	6	6	<b>5.0</b>
Health & Well-Being	4	4	4	4	3	4	4	5	6	5	5	<b>4.6</b>

<b>Average Mark in OER</b>	<b>4.3</b>	<b>4.7</b>	<b>4.9</b>	<b>4.7</b>	<b>3.9</b>	<b>4.3</b>	<b>4.3</b>	<b>4.9</b>	<b>5.4</b>	<b>5.4</b>	<b>5.7</b>	<b>4.9</b>
<b>Comparison Scale<sup>c</sup></b>	<b>4</b>	<b>5</b>	<b>5</b>	<b>4</b>	<b>3</b>	<b>4</b>	<b>4</b>	<b>5</b>	<b>5</b>	<b>5</b>	<b>5</b>	<b>4.6</b>

Note: The marks of the three disputed OERs are shaded gray. The marks assigned and supported by LCDR B, the reporting officer for the second and third disputed OERs are shaded a darker gray.

<sup>a</sup> Supervisors fill in the marks for the first 13 categories, and reporting officers complete the remaining marks.

<sup>b</sup> Averages are rounded and do not include marks from shaded columns.

<sup>c</sup> The comparison scale is not numbered. However, as with the performance categories, there are 7 possible marks. Officers are supposed to be marked in comparison with all other officers of the same rank whom the reporting officer has known. A mark in the 3<sup>rd</sup>, 4<sup>th</sup>, or 5<sup>th</sup> spot on the scale means that the officer is "one of the many competent professionals who form the majority of this grade."

## VIEWS OF THE COAST GUARD

On October 7, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case by removing the three disputed OERs. He based his decision in part on a memorandum on the case submitted by the Commander of the Coast Guard Personnel Command (CGPC).

Commander, CGPC, stated that "there was a hostile workplace climate about USCGC XXXXXX under the command of [the CO]." He noted that sworn affidavits by officers and enlisted members of the crew had shown that the CO treated the applicant "in a very unprofessional and biased manner." He took issue, however, with the allegation that the CO of the Xxxxxx had violated the Personnel Manual by ordering that the applicant's marks be lowered. In this regard, he submitted affidavits by the CO and LCDR B, who served as XO and the applicant's reporting officer for the second and third disputed OERs. In her affidavit, the CO supported the negative comments about the applicant's lack of professionalism and demeanor made in the third disputed OER and stated the following regarding the preparation of the disputed OERs:

With regards to [the applicant's] claim that I ordered or coerced the rating chain members to downgrade numerical ratings and supporting comments in his OERs, that is untrue and unfounded. In the course of my responsibilities as Commanding Officer, I did assist all of my subordinates with the preparation of OERs. [The applicant's supervisor and both XOs] were all relatively inexperienced at writing OERs and therefore, I believed I was responsible to train and counsel them in the appropriate methods of evaluating their subordinates. However, most of my training, counseling, and assistance was editorial in nature or assisted them in focusing on the key issues for comment. This training was no more or less than I provided in other personnel related issues on the vessel.

In his affidavit, LCDR B stated the following in pertinent part:

I was the Executive Officer and Reporting Officer for [the applicant] during the [marking periods for the second and third disputed OERs]. During these periods, [the CO] did not manipulate me in any way nor did she influence the marks that I assigned. I provided a fair and accurate evaluation of [the applicant's] performance at the time.

However, when I reported onboard I observed tension between [the applicant] and the Commanding Officer, which increasingly got worse as time went on. Additionally, the overall climate onboard was also very tense probably due to the dismissal of the Executive Officer who superseded me. Having said that, the Commanding Officer never expressed to me any dislike for [the applicant] or in my opinion treated him unfairly. At the time, [he] was a very intelligent individual, but was extremely immature and seemed to be unwilling to conform to military customs and practices.

Commander, CGPC, noted that, on the disputed OERs, "[t]here are no indications, such as whiteouts or lineouts that would indicate marks or comments were changed after signature by the Supervisor or Reporting Officer. ... In all cases, the rating officials signed the OERs denoting that the marks and comments were properly

prepared and accurately represented their views of [the applicant's] performance." He also stated that, "[w]hile [LCDR D's] declaration very strongly states that he was ordered to lower marks, the fact that he was able to convince [the CO] to leave some of the marks as assigned suggests that she was merely holding him accountable for supporting his assigned marks." Commander, CGPC, stated that in light of the CO's responsibilities and limitations under Article 10.A.2.f.2.a. of the Personnel Manual, "one can argue whether [she] ordered or used undue influence on the rating chain to lower marks on the Applicant's evaluations, or whether she was simply fulfilling her Reviewer responsibilities in accordance with the CG Personnel Manual. However, one cannot overlook the hostile workplace climate that existed during this period, and the negative impact that it surely had on the rating chain to present independent views." Because the CO "fostered a hostile environment that created personal conflict with the Applicant, [she] should have been disqualified as a member of [his] rating chain," pursuant to Article 10.A.2.g. of the Personnel Manual. He therefore concluded that the disputed OERs should be removed from the applicant's record.

Commander, CGPC, further noted, however, that "the facts surrounding the Applicant's alcohol incident are irrefutable. By the Applicant's own admission, his consumption of alcohol the night before he arrived two hours late to his assigned duty ... was a major factor in his inability to perform his appointed duties at the prescribed time." He argued that an alcohol incident is "a serious breach of professional responsibility, so much so that two offenses in a member's career normally result in expulsion from the Service. As such, past precedence shows that officers with a recent alcohol incident on record are not very competitive at promotion boards." Therefore, he recommended that the documentation of the alcohol incident remain in the applicant's record and that his date of rank not be backdated to October 29, 2002.

With respect to the applicant's request that his supervisor's recommendation for an Achievement Medal be processed, Commander, CGPC, asked the Board to deny the request because (a) the rules require comment or recommendation by the CO, (b) such recommendations must be submitted within three years, and (c) due to the delay, the purpose of such awards—fostering high morale, incentive, and esprit de corps—would not be met. Moreover, he noted that the CO apparently did not find fit to recommend anyone for a decoration as a result of their response to the flooding incident.

TJAG supported the recommendations of Commander, CGPC, and argued that "[t]here is an insufficient nexus between the OERs of which Applicant complains and his initial failure to select for O-3." TJAG noted that, under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), when determining whether an applicant's failure of selection for promotion should be removed, the Board must answer two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" TJAG alleged that, although the applicant's record "arguably looked worse



than it would have absent the objectionable OERs, ... it is unlikely that he would have been promoted in any event" because of the alcohol incident in his record, which "called into question Applicant's judgment and fitness for continued service even at his current pay grade." TJAG argued that "it is unlikely that such an officer would be found 'best qualified' [for promotion] until sufficient time had passed to assure the selection board that the officer was not likely to repeat his mistake."

With respect to the Achievement Medal, TJAG argued that the process for awarding personal decorations is highly subjective and that no one is entitled to such an award. TJAG argued that "the system exists not for the benefit of the individual service member but rather to foster morale and esprit de corps to benefit the organization as a whole. No one was formally recognized for their part in the incident for which Applicant claims entitlement to a medal. That was his command's prerogative." TJAG argued that if the Board were to order that a recommendation for a medal for the applicant be processed through an awards board, the result would "to introduce error into Applicant's record, not correct it."

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

On October 7, 2004, the Chair sent the applicant copies of the views of the Coast Guard and invited him to respond within 30 days. The applicant was granted one week's extension and responded on November 11, 2004.

The applicant argued that there was a strong nexus between the disputed, erroneous OERs and his failure of selection in 2002. He argued that there "can be no doubt that three erroneous evaluations in a row ... made his record look considerably worse than it otherwise would have."

The applicant further argued that once an error has been proved, "the Coast Guard bears the ultimate burden to demonstrate that the error was harmless—i.e., that [he] would not have been promoted in any event. *See e.g., Christian et al. v. United States*, 337 F.3d 1338 (Fed. Cir. 2003) ('end burden of persuasion falls to the Government to show harmlessness') (citing *Engels* ...) ... *Frizelle v. Slater*, 111 F.3d 172, 179 (D.C. Cir. 1997) ('government has the ultimate burden of persuasion')." The applicant argued that in his case, "the error stands admitted, and all we have from the Coast Guard is its unsupported assertions ... that, because of a 'documented alcohol related incident,' it is unlikely that [he] would have been promoted in any event." He argued that because the Coast Guard cited no evidence for this proposition, "it is impossible for ... the Board to test whether the Coast Guard's assertion is accurate or merely an impression." The applicant alleged that the Coast Guard should be able to show "whether every single lieutenant junior grade with an alcohol incident letter in his or her record failed to select for promotion to the rank of lieutenant the first time around."

The applicant argued that the fact that he was selected for promotion in 2003 “contradicts the Coast Guard’s claim that [he] was not competitive [in 2002] and that he would not likely have been promoted in any event. Indeed, it demonstrates that a junior officer can be competitive and promoted even with a documented alcohol incident.”

The applicant alleged that it “is completely inconsistent for the Coast Guard, on the one hand, to conclude that the commanding officer was personally biased and hostile towards [him] with respect to his evaluations, but, on the other hand, to insist that she was fair and accurate in her assessment and characterization of the alcohol incident.’ ... The commanding officer exaggerated and mischaracterized the facts” to try to get him “kicked out of the Coast Guard,” which was her goal. He also pointed out that the alcohol incident occurred after he “had endured nearly one year of [the CO’s] abuse and hostility.” The applicant argued that although he had admitted that he was late to work one morning after having consumed alcohol the night before, he never agreed that the circumstances warranted documentation of an “alcohol incident.”

The applicant also argued that it was inconsistent for the Coast Guard to admit that the CO was biased against him but to suggest that the Board should presume that she acted correctly and in good faith when she refused to process his supervisor’s recommendation for an Achievement Medal. Moreover, the applicant pointed out, he is not claiming “entitlement” to the medal, as the Coast Guard alleged; he is “seeking a fair and impartial review of the proposed decoration.” He argued that awarding him this medal would be consistent with the Board decision in BCMR Docket No. 83-82<sup>6</sup> and that there is plentiful evidence of his actions both in the third disputed OER and the Coast Guard’s investigation of the flooding incident.

## **APPLICABLE REGULATIONS**

### *Coast Guard Personnel Manual*

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. of the manual in effect in 1999 and 2000 provides that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Under Article 10.A.2.g.2.b., a CO may be disqualified from serving on a subordinate’s rating chain if the CO has been “relie[ved] for cause due to misconduct or unsatisfactory performance, [is] an interested party to an investigation or court of

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<sup>6</sup> In BCMR Docket No. 83-82, the applicant asked the Board to award him an Achievement Medal, in addition to reinstating him in the Coast Guard and facilitating his advancement to E-8, with a backdated date of rank. The Board found that the applicant had been wrongfully discharged for allegedly committing a homosexual act, and that he had been wrongfully denied an Achievement Medal by the Chief of the Personnel Division, after a chief warrant officer had recommended him for a Commendation Medal and an awards board had indicated that an Achievement Medal was merited. In addition to reinstating the applicant and granting other requested relief, the BCMR recommended awarding the member an Achievement Medal, and the recommendation was approved by the delegate of the Secretary.

inquiry, or [in] any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.”

Article 10.A.4.d.4. of the Personnel Manual instructs supervisors to prepare their section of an OER by assigning the reported-on officers marks in the first 13 performance categories in accordance with the written descriptions of performance on the OER form. Written comments are to be added to support marks that are higher or lower than a 4. Written comments are supposed to be consistent with the marks.

Article 10.A.2.e.2. provides that the reporting officer completes his section of the OER, including the comparison scale and comments about leadership skills and potential, and “[e]nsures the Supervisor fully meets responsibilities for administration of [the evaluation system]. 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. provides that it is the responsibility of the reviewer to “[e]nsure[] the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.” Article 10.A.2.f.2.c. provides 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 may not direct in what manner an evaluation mark or comment be changed.” Under Article 10.A.2.f.2.d., the reviewer is supposed to “[c]ounsel Reporting Officers whose evaluation habits deviate significantly from the prescribed procedures,” and such deficiencies in the preparation of OERs may be reflected in the rating chain members’ own OERs.

Article 10.A.4.g. allows the reported-on officer to file a reply to any OER, within 15 days of receiving a copy of it, to “express a view of performance which may differ from that of a rating official.” The reply is forwarded up the rating chain, who may respond in writing, before being entered in the officer’s record with the OER by CGPC.

Article 20.B.2.d. defines an “alcohol incident” as “[a]ny behavior in which the use or abuse of alcohol is determined to be a significant or causative factor and which results in the member’s loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ) or federal, state, or local laws.” Article 20.B.2.e. requires that an alcohol incident be documented in a letter in an officer’s record with the results of his alcohol screening. Article 20.B.2.h. provides that “[o]fficers will be processed for separation following a second alcohol incident.”

Article 14.A.4.d. states that the materials and paperwork furnished in personnel records for consideration by selection boards include such items as “ ... page 7 entries, documentation of alcohol incidents, and reports of civil arrests, performance evaluations, education information, and awards and discipline documentation.”

### *Coast Guard Awards Manual*

Chapter 1.B.2. of the Awards Manual states the following:

Military decorations are awarded in recognition of individual and/or sustained acts of heroism, meritorious achievement or meritorious service above and beyond that ordinarily expected, and which distinguish an individual or unit from among those performing similar acts or services. The judicious and timely use of personal decorations and unit awards provides an effective means of fostering high morale, incentive, and esprit de corps; therefore, recommendations for military decorations and awards must be initiated promptly after the act or period of service being recognized, in sufficient time to ensure presentation before the recipient detaches from the unit at which the award was earned.

Chapter 1.E.1. provides the following:

The originator [of an award], if other than the commanding officer or officer-in-charge of the individual concerned, must forward the recommendation to that commanding officer for comment and/or recommendation prior to forwarding via the chain of command. To be meaningful, award recommendations must be timely. For oversight purposes, however, recommendations for unit awards and personal decorations must be submitted within 3 years from the date of the act or service. ... If a recommendation is otherwise lost, certification by competent authority, accompanied by a copy (or reconstruction) of the recommendation, will be considered.

Chapter 2.A.10.a. states that a Coast Guard Achievement Medal

is given for professional and/or leadership achievement in a combat or noncombat situation based on sustained performance or specific achievement of a superlative nature and shall be of such merit as to warrant more tangible recognition than is possible by the Commandant's Letter of Commendation Ribbon, but which does not warrant a Coast Guard Commendation Medal or higher award.

(1) Professional Achievement. To merit the award, professional achievement must clearly exceed that which is normally required or expected, considering the individual grade or rate, training and experience, and must be an important contribution that is beneficial to the United States and the United States Coast Guard.

(2) Leadership Achievement. To merit the award, leadership achievement must be noteworthy; be sustained so as to demonstrate a high state of development or, if for a specific achievement, be of such merit as to earn singular recognition for the act(s); and reflect most creditably on the efforts of the individual toward the accomplishments of the mission.

## 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.

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.

3. The Board agrees with the Coast Guard that the applicant has overcome the presumption of regularity and proved by a preponderance of the evidence that the CO of the *Xxxxxx* who served as his reviewer for the three disputed OERs was biased against him and treated him in a very unprofessional manner. Although LCDR B, the XO of the *Xxxxxx* for the marking periods of the second and third disputed OERs, stated that the CO "never expressed to me any dislike for [the applicant] or in my opinion treated him unfairly," the statements of the XO for the marking period of the first disputed OER, the Engineering Officer, Operations Officer, Administrative Officer, and others outweigh his opinion. Therefore, pursuant to Article 10.A.2.g.2.b. of the Personnel Manual, she should have been disqualified from serving on the applicant's rating chain for the disputed OERs because of her personal bias. Although two of the disputed OERs are among the best he received in his early career, the applicant has stated that he wants all three removed from his record. Therefore, the Board finds that they should be removed from his record and replaced with continuity reports.

4. The Coast Guard argued that the applicant did not prove that his CO violated Article 10.A.2.f.2.c. of the Personnel Manual by "direct[ing] in what manner an evaluation mark or comment be changed." In support of this position, the Coast Guard points to the CO's own allegation that she worked within the bounds of her authority under Article 10.A.2.f.2. and LCDR B's allegation that she did not influence the marks he assigned the applicant in the second and third disputed OERs. However, the reporting officer for the first disputed OER, LCDR D, has stated that the CO "ordered [him] to lower several of the marks and then to change the supporting language to support the lower marks. [He] specifically remember[s] her ordering [him] to lower the marks in professional competence, directing others, teamwork, judgment and professional presence, among others. During [the] discussions, [he] was able to persuade her to rescind her order to lower some marking areas but not others." The Coast Guard argues that, because LCDR D was able to persuade the CO to allow him not to lower certain marks, their discussion did not violate Article 10.A.2.f.2. of the Personnel Manual. However, the fact that LCDR D was able to persuade the CO to allow him not to lower certain marks does not mean that she did not in fact direct him to lower certain

marks. Therefore, with respect to the first disputed OER, the Board finds that the applicant has proved that the CO directed his reporting officer to lower certain marks in clear violation of Article 10.A.2.f.2

5. Moreover, the applicant's supervisor stated that during the preparation of all three disputed OERs, the final draft of the OER form contained several marks that were lower than those he assigned and that he himself did not lower those marks. Therefore, although, as the Coast Guard argued, the supervisor may have ultimately signed the disputed OERs with the lower marks as they appear in the record, the applicant has proved by a preponderance of the evidence that either his reporting officer or reviewer (the XO or CO) directed the lowering of certain marks in the supervisor's portion of the disputed OERs by lowering those marks himself or herself, in violation of Article 10.A.2.e.2. or 10.A.2.f.2. of the Personnel Manual. While the regulations require the reporting officer and reviewer to return inconsistent OERs to the supervisor for correction, they also clearly prohibit the reporting officer and reviewer from directly changing the OER marks assigned by the supervisor. If, in fact, the CO and LCDR B found that the applicant's marks were not adequately supported by the written comments, the Personnel Manual required them to return the draft OERs to the supervisor, who might have decided that it was appropriate to improve the consistency by rewriting the comments rather than by lowering the marks. The supervisor stated that he tried to protest the lowering of the marks he assigned in the second and third disputed OERs, but the reporting officer, LCDR B, rejected his protest and refused to allow him to take the matter to the CO.

6. Therefore, the Board finds that the applicant has proved by a preponderance of the evidence that the supervisor's section of all three disputed OERs and the reporting officer's (LCDR D's) section of the first disputed OER were prepared with lower marks upon the direction of the CO in violation of Article 10.A.2.f.2. of the Personnel Manual. Moreover, the applicant has proved that, in the absence of these violations, the disputed OERs would have contained several higher marks in those sections. These violations and errors provide another basis for removing the disputed OERs in addition to the basis stated in Finding 3, above.

7. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine whether the applicant's failure of selection before the board that met in August 2001 should be removed because of the errors in his record when it was reviewed by that board, this Board must answer two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" The *Engels* court also held that, once the Board has determined that an applicant's record before a selection board contained prejudicial error, the applicant "must make a prima facie case" that he would have been promoted absent the prejudicial error, "but the end-burden of ultimate per-

suation lies with [the Coast Guard] to show the improbability of [the applicant's] selection even if his record were untainted" by the errors. *Id.* at 177.

8. In light of the Board's determination in Finding 6 that, in the absence of the violations of the Personnel Manual, the disputed OERs would have contained several higher marks in certain sections, the Board finds that the applicant's record was clearly prejudiced by the errors. The statements of the applicant's supervisor and LCDR D clearly show that several of the marks in the supervisor's section of all three disputed OERs and in the reporting officer's section of the first disputed OER would have been higher had they not been changed by the CO. Therefore, the Board finds that the first part of the *Engels* test is met.

9. Moreover, in light of the fact that 95% of all LTJGs "in the zone" for promotion to LT were in fact selected for promotion in September 2002, the Board finds that the applicant has made a prima facie case that he would have been promoted absent the prejudicial error. However, to answer the second question of the *Engels* test, the Board must consider what the applicant's record would have contained and how it would have appeared to the LT selection board in September 2002 in the absence of the CO's bias.

10. The Coast Guard argued that, in the absence of the CO's bias, the applicant's record would nonetheless have contained a documented "alcohol incident" on March 23, 2000, when it was considered by the selection board in September 2002. The applicant argued that but for his CO's bias, the incident would not have been characterized as an alcohol incident, and that the documentation should not be in his record. The Coast Guard has admitted that the CO created a hostile work environment on board the *Xxxxxx* and that she was particularly biased toward the applicant. The evidence of record strongly supports the applicant's allegation that his CO was irrationally biased against him and specifically targeted him with undeserved criticism and unfair treatment by, for example, blocking his qualification as deck watch officer. The applicant's supervisor (the Engineering Officer), the first XO, the Operations Officer, the Administrative Officer, and several junior officers and senior enlisted personnel have stated that the CO had an unfounded but strong personal dislike for the applicant and that she was incapable of evaluating him objectively or treating him fairly. The second XO, although he continues to deny the CO's bias contrary to the overwhelming evidence of record, did not mention the alcohol incident in his affidavit. In light of this evidence, the Board finds that the applicant has proved by a preponderance of the evidence that not only the disputed OERs but also the letter documenting the alleged alcohol incident, which the CO signed and entered in his record, must be considered tainted and suspect.

11. Moreover, under Article 20.B.2.d. of the Personnel Manual, COs have a considerable amount of discretion in deciding whether to characterize an event as an "alcohol incident." In fact, under the Personnel Manual, the applicant's CO had much

more discretion in deciding whether to document an “alcohol incident” than she had, as reviewer, in helping to prepare the applicant’s OERs, which the Coast Guard has conceded should be removed. The applicant has proved that the CO was very biased against him and could not be objective in assessing his performance and behavior. The Board finds that in all likelihood her bias strongly influenced her decision to place the letter documenting an alcohol incident in the applicant’s record. Therefore, the Board finds that the letter should be removed from his record. In addition, the Board finds that the letter should not have been in his record when it was reviewed by the selection board in September 2002.

12. In light of the findings above, the Board finds that the applicant has met the second part of the *Engels* test in that, without the errors (the lower marks in three OERs and the alcohol incident) introduced in his record because of his CO’s bias, it is more likely than not that he would have been among the 95% of LTJGs selected for promotion to LT in September 2002. Therefore, his date of rank as a LT should be backdated to what it would have been had he been selected for promotion in September 2002.

13. The applicant asked the Board to order the Coast Guard to process his supervisor’s recommendation that he receive an Achievement Medal as if his CO had approved it. The supervisor apparently initiated the Achievement Medal as a result of the applicant’s critical response to a serious flooding incident during the marking period for the third disputed OER. The applicant’s critical response to the flood is clearly documented in the third disputed OER, which must now be removed from his record because of the CO’s bias. His supervisor has indicated that the CO refused to process the Achievement Medal only because she disapproved of his overall performance and did not want to appear to be awarding that. However, the applicant has proved that she was biased against him and could not fairly evaluate his performance.

14. The Coast Guard argued that the applicant’s request regarding the proposed Achievement Medal should be denied simply because several years have passed and so one purpose of the awards program—fostering esprit de corps by the timely rewarding of achievement—would not be met. The Coast Guard’s argument, however, ignores the value of fostering the applicant’s own incentive and the very real effect such awards have on officers’ competitiveness before selection boards. The Board finds that the applicant has proved that but for his CO’s bias, the recommendation for the Achievement Medal would have been forwarded to the awards board. Therefore, the Board finds that it is in the interest of justice to order the Coast Guard to process the proposed Achievement Medal despite the lapse of time.

15. Accordingly, the applicant’s request to have the three disputed OERs removed from his record should be granted. In addition, the letter dated April 10, 2000, documenting his first alleged alcohol incident should be removed from this record. The applicant’s date of rank as a LT should be backdated to what it would have been had he



been selected for promotion by the LT selection board that met in September 2002, and he should receive backpay and allowances. Finally, the Coast Guard should process the applicant's supervisor's recommendation that he receive an Achievement Medal as if his CO had approved that recommendation and forwarded it in accordance with regulation.

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

## ORDER

The application of [REDACTED], USCG, for correction of his military record is granted in part as follows:

The three officer evaluation reports (OERs) covering his performance from April 1, 1999, to September 30, 1999; from October 1, 1999, to January 31, 2000; and from February 1, 2000, to May 21, 2000, shall be removed from his records. They shall be replaced with OERs prepared "for continuity purposes only."

The letter dated April 10, 2000, documenting the alcohol incident on March 23, 2000, shall be removed from his record.

The applicant's date of rank as a lieutenant shall be backdated to what it would have been had he been selected for promotion by the selection board that met in September 2002, and he shall receive corresponding backpay and allowances.

The Coast Guard shall process the applicant's supervisor's recommendation that he receive an Achievement Medal for his response to the flooding incident aboard the *Xxxxxx* as if his commanding officer had approved and forwarded the recommendation.

