

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

**BCMR Docket No. 1998-018
Technical Amendment**

TECHNICAL AMENDMENT TO FINAL DECISION

██████████ Attorney-Advisor:

This is a proceeding conducted under 33 C.F.R. § 52.73 to consider a technical amendment to the order issued by the Board in Docket No. 1998-018. The order was signed by the Deputy General Counsel on February 19, 1999. This technical amendment was requested by the Chief of the Office of Military Justice of the Coast Guard.

In its order in Docket No. 1998-018, the Board granted the applicant's requested relief, in part, by removing one of two disputed officer evaluation reports (OERs) and two failures of selection in 199x and 199x from his record. It also directed that, if he should be selected for promotion to xxxxx by the next selection board, his date of rank be backdated to the date he would have been promoted had he been selected for promotion by the 199x selection board.

Unbeknown to the Board, the applicant also failed of selection in August 199x. The OER that the Board ordered removed was still in his record at the time. Therefore, on July 8, 1999, the Coast Guard recommended that the Board amend its order in the case to include the removal of the applicant's failure of selection in 199x. The Coast Guard recommended that the correction be made before the next xxxxx selection board meets in August 1999.

FINDINGS AND CONCLUSIONS

1. The Board has jurisdiction over this matter pursuant to 33 C.F.R. § 52.73.
2. The OER that the Board ordered removed was still in the applicant's record when he failed of selection in 199x. All of the applicant's failures of selection that occurred while his record still contained the OER that the Board removed should also be removed from his record.

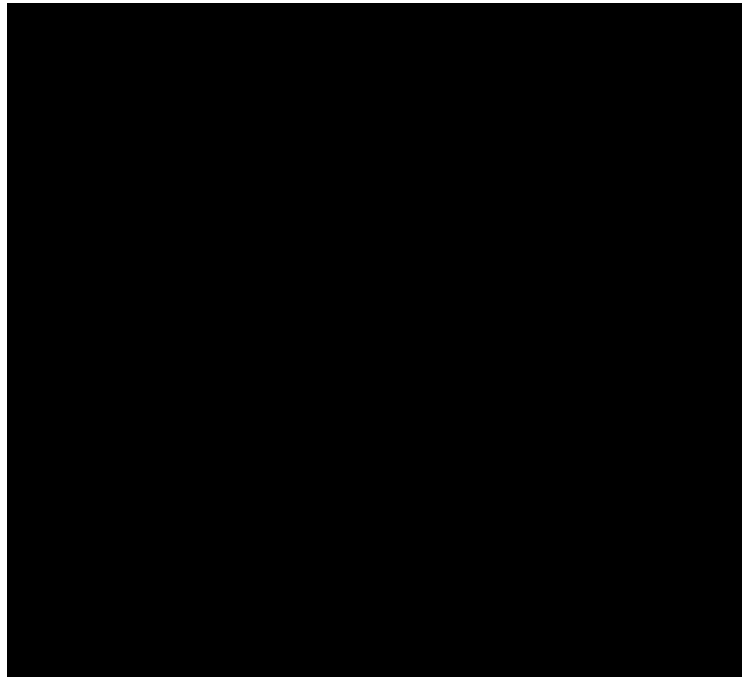
3. Accordingly, the final order in this case should be amended to remove the applicant's 199x failure of selection.

ORDER

The order issued by the Board in Docket No. 1998-018 to correct the military record of XXXXXXXXXX, USCG, is hereby amended.

The third paragraph (second bulleted item) of the order shall be deleted and replaced by the following:

- All record of the applicant's failures of selection for xxxxx by the 199x, 199x, and 1998x selection boards shall be removed.



**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-018

FINAL DECISION

██████████ Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on November 3, 1997, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated December 17, 1998, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant, a xxxxxxxxxxxxxxxx in the Coast Guard, asked the Board to correct his record by expunging two officer evaluation reports (OERs) because of improperly composed rating chains.¹ The two disputed OERs, which cover the periods August 22, 199x, to July 15, 199x, and July 16, 199x, to August 5, 199x, have significantly lower scores than the applicant's other OERs (see the chart on page 16, below). The disputed OERs would be replaced with two "For Continuity Purposes Only" OERs.

The applicant also requested that the Board remove from his record his failures of selection in 199x and 199x, which, he alleged, resulted from the presence of the two disputed OERs. If, after the OERs and failures of selection are removed from his record, the applicant is selected for promotion by the next selection board, he wants his date of

¹ The following abbreviations are used to refer to members of the applicant's rating chains:
"RO1" was the reporting officer for the first disputed OER. He was under investigation for [redacted serious charges] at the time he completed that OER.
"RO2" was the supervisor for the first disputed OER and the reporting officer for the second disputed OER. He later married S.
"S" was the supervisor for the second disputed OER. She later married RO2.

rank to be backdated to the date of his first failure of selection, and he wants to receive back pay and allowances.

APPLICANT'S ALLEGATIONS

Allegations Concerning First Disputed OER

The applicant alleged that the first disputed OER should be removed because a member of the rating chain, the reporting officer (RO1), was soon to be "be[] tried before a general court-martial and faced trial by jury in the xxxxxxxxxxxx." He also alleged that RO1 had completed the OER just 17 days before he pleaded guilty to [redacted crime] at the court-martial. The applicant stated that RO1 should have recused himself because, "there is no way that, given the personal strain which he faces as a result of the pending criminal actions against him, [RO1] could have fairly and accurately evaluated anyone in his chain of command."

To support his allegation about RO1's court-martial, the applicant submitted a photocopy of an Order of a General Court-Martial, dated xxxxxx, 199x, indicating that pursuant to an Order dated xxxxxx, 199x, RO1 had been arraigned on charges and brought to trial, at which he pleaded guilty to [redacted crime]. The same Order indicates that RO1 pleaded not guilty to "commit[ting] an [redacted serious charge]." The latter charge was withdrawn. RO1 was sentenced to "confinement at hard labor for three months" for [redacted crime].

In addition, the applicant submitted copies of court papers indicating that on xxxxxx, 199x, RO1 was found guilty of [redacted serious crime] and was sentenced to seven years in prison by civilian authorities. To support this allegation, the applicant submitted a photocopy of a Final Order of a trial, dated xxxxxxxxxxxx, 199x, which states that RO1 had been convicted of [redacted crime] and was sentenced to seven years in the penitentiary. The applicant also submitted (1) a copy of RO1's arrest warrant, executed on xxxxxx, 199x, which indicates that he had been charged with "[redacted crime]" in late 198x and early 198x; and (2) a photocopy of an Order denying RO1's appeal.

Allegations Concerning Second Contested OER

The applicant alleged that the second disputed OER, which covered the period from July 16, 199x, to August 5, 199x, should be removed because the supervisor [S] and reporting officer [RO2] for that OER married each other within a year of completing the OER. (See the timeline on page 16.) Prior to the summer of 199x, the applicant and S were the only two section chiefs who reported to RO2. In the summer of 199x, when RO1 retired due to his legal problems, RO2, who had been the applicant's supervisor, "fleeted up" to take his place, thereby becoming the applicant's new reporting officer. Soon thereafter, S "fleeted up" to take RO2's previous position and thereby became the applicant's supervisor. According to the applicant, "it is readily apparent that [RO2's] and [S's] marriage the following year raises a question of impropriety which cannot be dismissed."

On September 16, 1998, the Chief Counsel of the Coast Guard recommended denial of the applicant's request for relief.

The Chief Counsel urged the Board to deny the requested relief for lack of proof because the applicant "fails to offer any evidence of a nexus between the alleged 'personal interest or conflict' of his OER rating chain members and his documented job performance." He stated that "[t]o establish that the OER is erroneous or unjust, the Applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation." "With no evidence to the contrary, a presumption of regularity must be assumed regarding the conduct of his Supervisor and Reporting Officer." The applicant, the Chief Counsel stated,

has not alleged a misstatement of hard fact or any procedural defect in the disputed OERs nor has he provided evidence, much less prima facie proof, of any violation of a statute or regulation in this regard. Applicant provides no explanation or theory regarding how the alleged off-duty actions of members of his rating chain might have had a deleterious effect on the documentation of his performance in the disputed OERs. Further, he fails to point to any specific comment or mark that would demonstrate his unsupported claim.

The Chief Counsel stated that the applicant's receipt of the Meritorious Service Medal is not proof that the disputed OERs are in error because "medals and awards are not directly connected to the Officer Evaluation System." He pointed out that neither of the disputed OERs could be considered an "adverse evaluation" because "[n]o characteristic mark fell below 4," and that the applicant did not take advantage of the opportunity to submit responses that would have been included in his record with the OERs.

In regard to the first disputed OER, the Chief Counsel stated that RO1 was convicted of [redacted crime] before a general court-martial on xxxxxxxx, 199x. The Chief Counsel contended, however, that "[t]hese charges and court martial have no relationship to the Applicant." "Both [the court-martial and the civilian trial] occurred after the OER was completed, and did not have anything to do with [RO1's] Coast Guard employment." Furthermore, he asserted, "[t]here is no requirement that automatically disqualifies a rating official who is the subject of criminal proceedings."

In regard to the second disputed OER, the Chief Counsel stated that RO2 and S "were married in November 199[x], approximately 16 months after the close of the marking period" There is no proof that the intimate relationship between S and RO2 existed at the time they completed the second disputed OER. Furthermore, he stated, the "[a]pplicant offers no theory, much less prima facia proof, which would explain why the alleged relationship between his Supervisor and Reporting Officer would somehow adversely affect the appraisal of his performance." The Chief Counsel pointed out that the applicant apparently did not complain about the composition of his rating chain at the time of the evaluation.

The Chief Counsel attached to his advisory opinion affidavits from RO2 and S, who both stated that they had reviewed the disputed OERs and that the marks they awarded the applicant were accurate, objective, fair, and based on his overall performance during his tour of duty at Coast Guard Headquarters. RO2 stressed that the marks he gave the applicant in the second disputed OER were "consistent with [the applicant] learning the job and growing more competent with that knowledge and experience." He pointed out that, in the second disputed OER, he had "strongly recommended [the applicant] for promotion to CDR with his peers," and that "in the [first disputed] OER, [the applicant's] first as [a xxxxxxxxxxxx], it would be totally inappropriate to recommend him for promotion to [xxxxxxxxxxxx]. He would not even be eligible for another year. I still believe that he was well qualified to become [a xxxxxxxxxxxx] and I am disappointed to find out that two selection boards didn't select him."

RO2, whose supervisor was RO1, included the following comments about RO1's performance prior to his court-martial in his affidavit:

. . . Sometime during the period of the OER, I recall [RO1] becoming involved with military justice matters related to his xxxxxxxx. I observed nothing to indicate his work was affected by his life outside of work. I was sensitive to this, as he was my direct supervisor. In all instances of my dealings with [RO1], I recall him to be focused on his CG work. . . . [RO1] appeared to closely review the OER and wanted changes/clarifications. . . . I was also aware of an out-of-the-office relationship between [RO1 and the applicant] that seemed to involve fitness activities such as jogging. I didn't follow the situation very closely, but I am under the impression that [RO1] would not neglect an OER of [the applicant]. . . .

In regard to the applicant's failures of selection, a memorandum sent to the Chief Counsel by the Military Personnel Command states that "[s]election to xxxx is very competitive. The stated opportunity of selection to xxxx for promotion years 199x and 199x was xx percent." However, the Chief Counsel admitted, the applicant's record would have been stronger without the disputed OERs. "Therefore, if the BCMR were to find that either of the disputed OERs were erroneous or unjust, the Coast Guard concedes that there would be a nexus between Applicant's non-selection to xxxx and the existence of the disputed OERs in his record."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 17, 1998, the Chairman forwarded a copy of the Chief Counsel's advisory opinion to the applicant and invited him to respond within fifteen days. The applicant requested two extensions, which were granted. On November 18, 1998, the applicant submitted his response to the advisory opinion.

In response to the advisory opinion, the applicant submitted an affidavit signed by RO1, the reporting officer for the first disputed OER. RO1 stated the following:

I have reviewed the contested OER and agree that the report is incomplete and underrates his performance in several areas. . . . [In] Block 3.a . . . [the applicant's] effort should have earned him a mark of at least 5 [In] Block 3.c . . . [his] accomplishment should have earned him a mark of at least 5 [In] Block 3.d . . . [h]is responsiveness was impressive and should have earned him a 5 if not a 6 in this block. . . . [In] Block 4.a . . . [a] mark of at least 5 is warranted here. . . . [In] Block 11 . . . [t]his block being partially empty was a significant oversight on my part. [The applicant's] accomplishments and demonstrated leadership skills provided ample information to completely fill this block. . . . [Regarding the] Comparison Scale and Distribution: I marked [the applicant] as an exceptional performer. He should more accurately have been marked as a Distinguished Performer. He came into the job as the xxxxxxxxxxxx where the incumbent had been retired for at least 6 months. I specifically remember being impressed at how he aggressively assumed his duties and championed this high profile project from day one. . . .

My review indicates that this report is not an accurate representation of [the applicant's] performance for the period 28 Aug 9x - 15 Jul 9x. It is clear from his accomplishments during this 1 year period, that [the applicant] was fully capable of performing at the O-5 level and a recommendation to this effect should have been made.

I attribute the lack of thoroughness and accuracy on my part in preparing this OER to ongoing issues at the time. I retired from active duty on 1 Oct 9x but was retained until Aug 9x due to a UCMJ investigation. . . . During this time, I performed planning work for the Commanding Officer while preparing my defense. Needless to say, this period of time was not the high point of my Coast Guard career where I had served faithfully for over 20 years. In spite of my best intentions, I prepared an incomplete and inaccurate evaluation of [the applicant] that I signed on 23 Nov 9x.

RESPONSE OF THE COAST GUARD

On December 14, 1998, the Chief Counsel stated that the Coast Guard's advisory opinion was not changed in any way by the affidavit of RO1. The Chief Counsel questioned the validity of RO1's "retrospective review" and suggested that RO1's statements concerning blocks 3 and 4 in the OER were inappropriate since those blocks are completed by the supervisor of an OER, not by the reporting officer.

RELEVANT REGULATIONS

Preparing an OER

Article 10.A. of the Coast Guard Personnel Manual (COMDTINST M1000.6A) governs the preparation of OERs. Each OER is prepared by the reported-on officer's "rating chain" of three senior officers: the supervisor (the officer to whom the reported-on officer answers on a daily basis), the reporting officer (the supervisor's supervisor),

and the reviewer (the reporting officer's supervisor). According to Article 10.A.2.e.(2) of the Personnel Manual, which governs the responsibilities of the reporting officer, the reporting officer

(d) [e]nsures the Supervisor fully meets responsibilities for administration of [the Officer Evaluation System]. Reporting Officers are expected to hold those persons designated as Supervisors accountable for timely and accurate evaluations. If a Supervisor submits evaluations that are inconsistent with actual performance or unsubstantiated by narrative comments, the Reporting Officer shall return the report for correction or reconsideration, counsel the Supervisor, and consider this when reporting on the performance of the Supervisor. The Reporting Officer may not direct in what manner an evaluation mark or comment is to be changed

...

According to Article 10.A.2.f.(2) of the Personnel Manual, which lists the responsibilities of the reviewer, the reviewer

(a) [e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential.

(b) [c]hecks for obvious errors, omissions, or inconsistencies between numerical evaluations and written comments and any failures to comply with instructions. . . .

•••

(d) [e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the [Officer Evaluation System]. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. . . .

Article 10.A.2.g. of the Personnel Manual provides for exceptions to the rating chain composition:

(1) In instances where a Supervisor, Reporting Officer, or Reviewer is unavailable or disqualified to carry out the responsibilities of a member of the rating chain, the next senior officer in the chain of command will designate an appropriate substitute who is capable of evaluating the Reported-on Officer. . . .

•••

(2) (b) "Disqualified" includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer rais-

es a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation.

Article 10.A.4.d. of the Personnel Manual governs the preparation of OERs. Paragraphs (4) and (7) instruct the rating chain members as follows:

(b) For each evaluation area, the Reporting Officer [or Supervisor] shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Reporting Officer [or Supervisor] shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Reporting Officer [or 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.^[2] After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer [or Supervisor] fills in the appropriate circle on the form in ink.

• • •

(d) In the "Comments" sections following each evaluation area, the Reporting Officer [or Supervisor] shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a "4." . . .

(e) Comments should amplify and be consistent with the numerical evaluations in the evaluation area. They should identify specific strengths and weaknesses in performance or qualities. Well-written comments must be sufficiently specific to paint a picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. . . .

Replies to OERs

Article 10.A.4.h. allows the reported-on officer to reply to any OER and have the reply filed with the OER if they are submitted within 14 days of receipt of the OER copy from the commandant. The provision for reply is intended to "provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official."

Romantic Relationships

² The shaded language appears only in the instructions for supervisors in paragraph (4) of Article 10.A.4.d., not in the instructions for reporting officers in paragraph (7).

Article 8.H. of the Coast Guard Personnel Manual governs personal relationships between Coast Guard members. According to Article 8.H.3.b., a romantic relationship between a supervisor and a subordinate is an “unacceptable relationship.” Article 8.H.2.d.3.c. states that “unacceptable relationships” shall normally be resolved administratively if not terminated.

SUMMARY OF APPLICANT’S RECORD

Prior Service Records

On May xx, 198x, the applicant graduated from the Coast Guard Academy with a Bachelor of Science in xxxxxxxxxx. In 198x, he was promoted from xxx to xxx and worked as an xxxxxxxxxx for a xxxxxxxxxx. From 198x to 198x, the applicant was the xxxxxxxxxx. He received his first Commandant’s Letter of Commendation for his efforts.

After being promoted to xxx and earning a master’s degree in xxxxxxxxxx from the xxxxxxxxxx in 198x, the applicant served as section chief for a multi-state xxxxxxxxxx. He was responsible for maintaining xxxxxxxxxx and supervising five other xxxxxxxx. He was also the xxxxx representative for the contracting officer for the xxxxxxxxxx. In 198x, he received his second Commandant’s Letter of Commendation for his “exceptional” work on the xxxxx. His OER for this period is no. 1 in the chart on page 16.

From August 198x to August 199x, the applicant was assigned to the xxxxxx, where he served as the commanding officer of the xxxxxxxx detachment. He coordinated xxxxxxxxxx for the xxxxxxxx region, supervising a staff of eleven and the installation, testing, evaluation, supply, and training for all xxxxxxxxxx-related work. During this period he was promoted to xxx and he was awarded a Coast Guard Achievement Medal. The applicant’s OERs for this period (nos. 2 through 6 in the chart on page 16) state that he

- “respond[ed] to many non-working hours emergency calls”;
- “excel[led] in independent [commanding officer]/administrator role”;
- “[did] outstanding job pulling resources from any/anywhere to meet customer needs”;
- “[was] particularly adept at handling the sensitive ‘politics’ . . .”;
- “demonstrat[ed] high-level of administrative competence”;
- “quickly/independently resolved numerous personnel problems”;
- “[i]n anticipation of the loss of procurement support . . . , he formed & trained purchasing section to do the work in-house”;
- “molded a highly effective & motivated unit”;
- “developed excellent working relationships with local vendors/agencies”;
- “continu[ed] to produce exceptional work”;

- “[p]rojected a dedicated and professional image”;
- “set an outstanding example for unit”;
- “represented [the Coast Guard] in sports events & marathon”;
- “completed critical xxxxxxxxxxxxxxxxxxxxxxxx”;
- “provided expert advice . . . on support of xxxxxxxxxxxxxxxxxxxxxxxx systems”;
- “[was] exceptionally successful as the Commanding Officer of [his unit]”; and
- “[was] recommended for promotion [to xxxxx] with his peers.”

Records Concerning First Disputed OER

From August 199x to June 199x, the applicant was Section Chief of the xxxxxxxxxxxxxxxxxxxxxxxx at Coast Guard headquarters. He was responsible for the budgeting and implementation of the \$xx million xxxxx at xxxxx, under the supervision of the project manager. He administered a \$xx million budget and supervised three persons.

The first disputed OER (no. 7 in the chart on page 16) covers the applicant’s first year at this post, from August 22, 199x, through July 15, 199x. During this first year, RO2 was the xxx project manager to whom the applicant reported. The only other section chief to report to RO2 was S, whom RO2 later married in late 199x. RO2 was the supervisor for the first disputed OER. When RO1, the reporting officer for the first disputed OER, retired in the summer of 199x (but continued to work in the same position) prior to his court-martial, RO2 “fleeted up” and S took over RO2’s position as the applicant’s supervisor. The first disputed OER was signed by RO2, as supervisor, RO1, as reporting officer, and the Chief of the xxxxxxxxxxxxxxxxxxxxxxxx, as reviewer, in November 199x, just one month before RO1 was arraigned for [redacted charge]. RO1 had been under investigation for xxxxxxxxxxxxx[redacted charge]xxxxxx for several months. In June 199x, RO1 pleaded guilty to the charge of xxxxxx but not guilty to the charge of xxxxxxxx. The latter charge was dropped by the military authorities. However, in June 199x, the applicant was convicted by civilian authorities of xxxxxxxxxxxxx for a 198x incident involving a xxxxxxxxxxxxx.

The first disputed OER differs significantly from the applicant’s previous and subsequent OERs in both the numerical scores, which are lower, and comments, which are less laudatory. Although none of the comments in the first disputed OER could be called critical, they tend to describe in detail what work the applicant performed rather than describing how well he performed the work. The OER contains the following notable comments by RO2 acting as the supervisor:

- “Anticipated need to obtain a Delegation of Procurement Authority (DPA) for procurement of xxxxxxxxxxxxxxxx and began documentation process, preventing a possible delay in the xxx project completion. Saw a need to retain additional property at a decommissioned [Coast Guard] unit that was being

returned to the state. Shifted workload of [ensign] to relieve backlogged correspondence allowing the expediting of closing down unused xxxxxxxx Planned and executed high interest project to xxxxxxxx for xxxxxxxxxxxxxx of xxx mandated by [the Office of Management and Budget]. . . . Generated accurate budget for the xxx project and well thought out spreadsheet to track procurements. Quickly responded to xxxxx request for additional xxxxxx. . . . Demonstrated excellent understanding of the [Coast Guard] xxxxxxxx structure in planning the installation of a xxxxxx. Quickly became an expert in xxxxxxxx through professional reading and TAD technical training."

- "Extremely effective in working with [a support unit] in the retaining of additional property at a decommissioned unit for implementation of xxx. . . . Smoothly coordinated a xxxxxx project with many participants to install a xxxxxxxx in a short time period."
- "Provided excellent xx briefings at a professional society luncheon and at a Federal subcommittee meeting Demonstrated excellent listening skills in generating minutes from several meetings attended. . . . Drafted an exceptional letter to all district xxxxxs on the status of the xx project."

The first disputed OER contains the following comments from RO1 acting as the reporting officer:

- "I concur with the reporting officer's [sic] comments and numerical evaluation. [The applicant] is a great asset to the xxxxxxxxxxxx and the [xxxxx] Project. His considered thought, judgement and the extra effort he puts into all tasks is [sic] greatly appreciated."
- "Aggressively assumed duties as xxxx section chief, relieving project manager [RO2] of most matters. . . . Recommended excellent method to determine cccc failure statistics without placing more burden on field units. Extremely loyal – voiced disagreement with policy on xxxxx installations but enthusiastically worked . . . per policy guidelines. Put forth whatever effort and hours required to meet tight deadlines [C]ompleted xxxxxx."
- "Demonstrated outstanding military bearing Was an outstanding representative of the [Coast Guard] Very professional and proper."
- "[The applicant] has shown maturity and judgement in his work at all times. He leads by example. . . . Keen ability to get things done through his subordinates and working closely with other organizations. Strongly recommended for increased responsibility Can handle any [xxxxxxxx] billet in xxx arena."

Records Concerning Second Disputed OER

The second disputed OER (no. 8 in the chart on page 16) covers the second year of the applicant's duty at this post, from July 16, 199x, to August 5, 199x. S was the applicant's supervisor. RO2 was the xxxxxx project manager and the applicant's reporting officer. The same division officer that reviewed his first disputed OER also served as reviewer for this second disputed OER. The OER was signed by each member of the rating chain in December 199x. RO2 and S married each other in late 199x. There is no evidence concerning when their intimate relationship began, and neither RO2 or S addressed the matter in their affidavits except to say that the marriage did not affect their evaluations in the second disputed OER.

The marks the applicant received in the second disputed OER are mostly higher than those in the first disputed OER but still significantly lower than those he received in previous and subsequent OERs. In particular, the marks of 4 that the applicant received for the Speaking and Listening and Writing categories do not seem to match the comments which follow those marks (see last bullet in list immediately below). Those comments match more closely the description provided for a mark of 6 in those categories.³

S made the following comments on the second disputed OER:

- "Superb preparation in planning xxxxxxxxxxxx for XXXX project & management of its execution Developed outstanding XXXX implementation plan kept to [project schedule without] overburdening xxxxx or need for [additional personnel] resources Showed sound work life knowledge in assisting [Chief Warrant Officer] in resolving significant medical issues prior to retirement. Superb xx & organizational expertise."
- "Superbly worked [with] other units/staffs to resolve difficult issues"
- "Extremely supportive of section members Promoted an esprit de corps resulting in superior work environment that allowed significant project goals to be reached [with] minimal resources. Provided timely feedback to subordinates – helped meet critical deadlines."

³ The mark of 6 for the Speaking and Listening category is described as follows:

Displayed a remarkable ability to identify and discuss key issues, and to express thoughts clearly, coherently, and extemporaneously with credibility. Captivated and persuaded audiences. Chosen by superiors to make presentations on complex or sensitive issues, or when audience had unusual significance.

The mark of 6 for the Writing category is described as follows:

Expressed complex and controversial material in such a lucid and persuasive way that achievement of stated objectives was materially aided. Meticulous proofreader. Written material responsible for unit achievement or mission accomplishment, or published material brought credit upon [Coast Guard]. Provide noteworthy examples.

- “An exceptional speaker, chosen to give XXXX brief to distinguished panel of experts at [the xxxxxxxxxxx]. Gave outstanding briefings Drafted very specific & crucial response to xxxxxx flag [letter] Drafted & presented outstanding XXXX paper at . . . xxxxxxxx conference, chaired tech[nical] session on XXXX at conf[erence].”

RO2 made the following comments on the second disputed OER:

- “Concur with supervisor. [The applicant] achieved significant goals with limited resources Achieved outstanding results & kept XXXX project on schedule. Took initiative to develop XXXX demo[nstration] plan”
- “Extremely innovative & goal oriented, continually found ways to overcome major obstacles towards XXXX implementation Judgement always on the mark Demonstrated utmost responsibility in project [management] of XXXX Excellent physical condition, an avid runner”
- “Set the standard for military bearing in his section An outstanding [Coast Guard] rep[resentative] Responded to several inflammatory professional situations [with] poise & restraint to the benefit of the XXXX program.”
- “[The applicant] has demonstrated outstanding managerial, administrative, & technical skills, and is a critical member of the XXXX project Strongly recommended for promotion to [xxxxx] with his peers.”

Subsequent Service Records

The applicant remained at the same post until June 5, 199x. He was awarded the Meritorious Service Medal for his work on the XXXX project from October 199x to June 199x. The citation to the medal reads as follows:

[The applicant] is cited for meritorious service in the performance of duty . . . from October 199x to June 199x. Demonstrating exceptional leadership, [he] managed the implementation of the [xxx] When the National Environmental Protection [sic] Act (NEPA) requirements threatened a 1-year project delay, he developed and executed a creative plan which avoided \$xx in NEPA contract costs and simultaneously kept the project on schedule. When resource requirements threatened to delay XXXX implementation in the xx District, [he] developed an innovative plan to expedite xxxxxxxxxxx [His] diligence in formulating and negotiating a xxxxxxxxxxx . . . reduced the government’s costs in implementing this xxxxxxxx by combining resources and avoiding duplication. . . .

The third OER that the applicant received for his work on the XXXX project (no. 9 in the chart on page 16) was completed by a new rating chain and is significantly more favorable than the two disputed OERs. The following comments appear on that OER:

- “Anticipated xx XXXX proj[ect] concerns prior to senior xxxx conf[erence and] drafted status [letter] pre-empting/diffusing an adversarial situation at the conf[erence]. Developed innovative contingency plan Superbly managed limited resources to accomplish branch mission Completed daunting EA/NEPA prep[arations] for the entire XXXX project . . . preventing 1 year proj[ect] delay & avoiding \$xx cost of contracting this effort. . . . Extremely punctual in meeting deadlines. . . . Office expert in admin[istration]/doc[ument] process[ing].”
- “Masterful in coordinating efforts among diverse units Resolved ongoing turf battles between xxxxxxxxxxxxxxxxxxxx allowing xxxxxxxxxxxxxxxx to proceed to meet Congressionally promised dates.”
- “Exceptional/highly effective speaker, chosen by [program manager] for most sensitive briefs Gave powerful brief at xxxxxxxx XXXX [meeting] convincing xxxx that [Coast Guard] resources were the only solution to complete the proj[ect] on sched[ule]/within budget. . . . A superb writer Able to distill complex issues on paper”
- “This officer’s performance has been superior in all respects. His execution of the NEPA/EA program within xxx for the XXXX project is unprecedented in the Coast Guard and his personal efforts kept this high visibility (xxxxxxxxxxxxx) project on schedule and within budget. As acting XXXX project manager for a one month period, he showed impressive leadership and organizational skills/savvy while making critical decisions to resolve ongoing xxxxxxxxxxxxxx/logistical/resource problems.”
- “Superb initiative/[judgment] Showed utmost respon[sibility] towards meeting goals In superb physical condition [through] daily workouts resulting in high productivity/energy.”
- “[The applicant] has been a superb proj[ect] officer/brand chief. He has championed the XXXX proj[ect] & kept it on sched[ule,] overcoming every obstacle placed in his way. . . . He is a highly respected, versatile, & hard-working individual with excellent interpersonal skills – traits which will make him successful in any high visibility leadership pos[ition]. . . . I . . . give my highest recommendation for promotion to [xxxxx].”

From June 199x through April 199x, the applicant served as a xxxxxxxx in the xxxxxxxxxxxx office. He was responsible for xxxxxxxxxxxxxxxx coordination of strategic planning, long-range planning, programming, budgeting, execution and evaluation system efforts, developing spending plans for fiscal year 199x, and coordinating research and development projects. The OER he received for this work (no. 10 in the chart on page 16) contains such comments as "achieved superb results," "highly conscientious," "relentless," "extremely flexible/enthusiastic," "superior knowledge," "built exceptional relationship with xxx staff," "aggressively assumed leadership role," "developed superb guidance to the xxx board," "exceptional/skilled speaker," "first choice to brief xxx senior management," "impressive writer," "excellent prof[essional] tech[nical] expertise," "excellent judgment." His reporting officer concluded as follows:

An aggressive & dynamic officer. An outstanding asset to this office [and the Coast Guard]. Diligent, professional, & persevering manner is an excellent example for others and inspires juniors & coworkers to do their best. His quiet, confident, capable manner along with his exceptional interpersonal skills quickly earns trust & respect of others. His exceptional judgment, dedication, leadership, and initiative demonstrates that he is capable and highly recommended for positions with greater responsibility. An ideal candidate and highly recommended for any high visibility leadership position . . . and/or senior service school. I most strongly recommend [the applicant] for selection to [xxxxx].

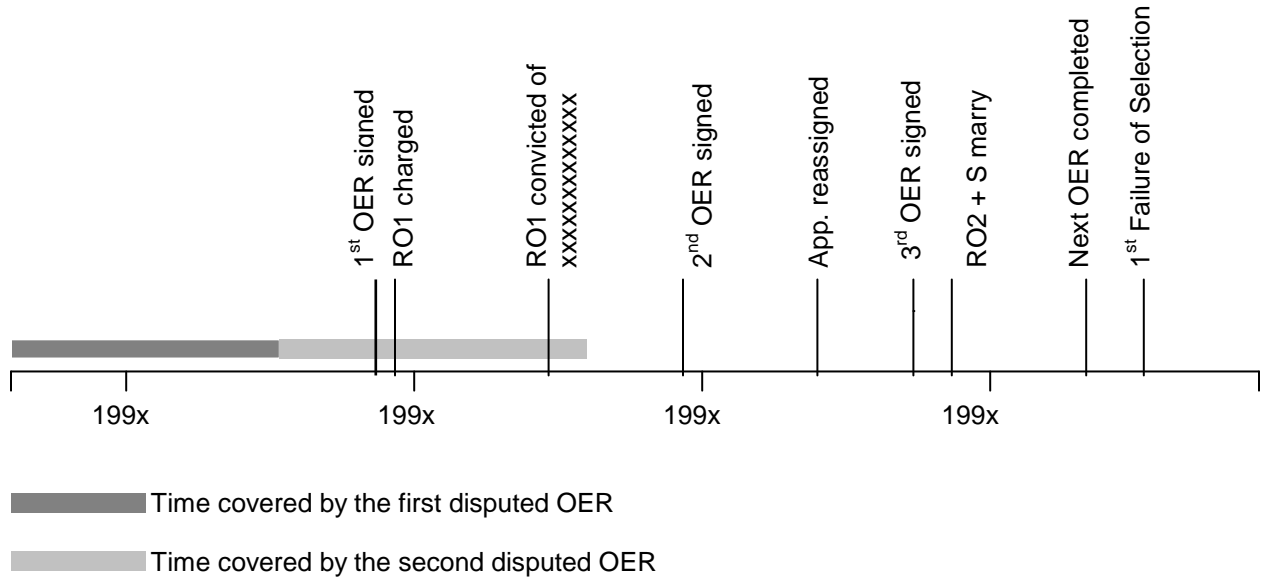
This OER was signed in June 199x. For this work, the applicant also received a third letter of commendation from the Commandant, date May 16, 199x. Both were presumably in the applicant's record when he first failed of selection to xxxxx in xxxxxxx 199x.

From May 199x to the present, the applicant has served as Chief of the xxxxxxxx of the xx Coast Guard District. The two OERs he has received for this post (nos. 11 and 12 in the chart on page 16) contain comments similar to those contained in the two immediately preceding OERs. The reporting officer included the comment "Should be promoted now!" and the reviewer took the unusual step of adding the following comments to the OER:

I feel compelled to provide reviewer comments because of the value [the applicant] has added to my staff and to operations in the xxxxxxxx District. . . . He has excelled in every regard. He has put the role of the xxxxxxxxxxxx center stage while deploying technologies that have markedly improved xx operations. He has demonstrated visionary leadership skills in managing his program; skills that I covet in my staff. . . . He looks ahead, develops a plan, and makes it happen! He also has made the xxxxxxxxxxxxxxx more accessible and responsive to our operational units. The capabilities, demeanor and forward looking mindset of this officer are the traits we need in our workforce and leadership of the 21st century!

However, the applicant again failed of selection for xxxxx in xxxxx 199x.

Timeline of Events



APPLICANT'S MARKS IN 12 OERs FROM 1/1/8x THROUGH 4/30/9x

CATEGORY^a	1	2	3	4	5	6	7^b	8^b	9	10	11	12	AVE^c
Being Prepared/Planning													
Using Resources													
Getting Results													
Responsiveness ^d													
Work-Life Sensitivity ^d													
Adaptability ^d													
Specialty Expertise/ Professional Competence													
Collateral Duty ^d													
Warfare Expertise ^d													
Working with Others/ Teamwork													
Human Relations/ Workplace Climate													
Looking Out for Others													
Developing Subordinates													
Directing Others													
Evaluations													
Speaking & Listening													
Writing													
Initiative													
Judgment													
Responsibility													
Stamina ^d													
Health & Well-Being													
Military Bearing ^d													
Professionalism													
Dealing with the Public ^d													
Comparison Scale ^f													
Average for OER													

^a Some categories' names have changed slightly over the years.

^b Disputed OER.

^c Average score of all OERs except disputed ones, which are shaded. Averages have been rounded.

^d Category nonexistent until later years, or category discontinued.

^e Score given was "NO," which means there was no opportunity to observe this trait.

^f The Comparison Scale is not actually numbered. In this row, "5" means the applicant was rated to be a "distinguished performer; give tough, challenging, visible leadership assignments." A "4" means the applicant was an "exceptional performer; very competent, highly respected professional."

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, United States Code. Under Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 199x), the application was timely.

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

3. The applicant alleged that his rating chains for two OERs had been improperly constituted. He asked the Board to remove those OERs and two subsequent failures of selection from his military record and allow him to be considered for promotion by two additional selection boards. He alleged, and the Coast Guard admitted, that the reporting officer for the first disputed OER was under investigation for xxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx and was about to be court-martialed at the time he completed the OER. In regard to the second disputed OER, he alleged, and the Coast Guard admitted, that the supervisor and reporting officer for the rating chain had married within one year of when they completed the OER.

4. At the time the first disputed OER was completed, the reporting officer was under investigation for xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He was about to be court-martialed. Article 10.A.2.g. of the Personnel Manual requires "disqualified" members of a rating chain to be replaced. It defines "disqualified" as "includ[ing] relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question whether the Reported-on Officer will receive a fair and accurate evaluation." Under this provision and the circumstances of this case, the Board finds that the Coast Guard committed an error when it allowed the reporting officer of the first disputed OER to remain on the rating chain.

5. The Chief Counsel argued that being the subject of a criminal investigation does not, per se, disqualify someone for a rating chain. On its face, however, Article 10.A.2.g. of the Personnel Manual does not require a reported-on officer to be personally involved in the investigation or inquiry for the reporting officer to be disqualified. The applicant has alleged, in essence, that the reporting officer for the first disputed OER was too preoccupied with his own legal troubles to pay adequate attention to the applicant's OER. The reporting officer signed an affidavit indicating that he

was, in fact, distracted by his personal problems, and he pointed out specific deficiencies in the OER that he would have corrected had he not been distracted.

6. The Chief Counsel also alleged that the applicant was required to, but did not, point out specific marks or comments that were inaccurate. The applicant cited the overall lower marks he received as the inaccuracy requiring removal of the entire OER rather than pointing to specific errors in the OER. Although the significantly lower marks received by the applicant are not, by themselves, proof of inaccuracy, they lend credence to the applicant's contention that the reporting officer may not have paid adequate attention to the OER because he was preoccupied with his legal troubles.

7. Therefore, the Board finds that the reporting officer's involvement with the legal system at the time he was reviewing and completing the applicant's OER overcomes the presumption of regularity and raises a substantial question of whether the reporting officer was able to focus sufficient attention on the OER to ensure that it would be fairly and accurately completed. Thus, the Coast Guard erred when it failed to remove the reporting officer from the applicant's rating chain for the first disputed OER.

8. The applicant has failed to prove that the Coast Guard committed an error with regard to the second disputed OER. At the time the OER was completed, the supervisor and reporting officer for that OER may have been involved in a romantic relationship. They were married less than a year later. Neither the applicant, the Coast Guard, or the officers in question presented any evidence as to whether they were already involved in a romantic relationship when they completed the applicant's second disputed OER. Because the reporting officer supervised the supervisor for the second disputed OER, a romantic relationship at the time would have been an "unacceptable relationship" according to Article 8.H.3.b. of the Personnel Manual.

9. Under Article 10.A.2.g. of the Personnel Manual, involvement in an "unacceptable relationship" would disqualify officers from serving on a rating chain if their relationship were to give them a personal interest in downgrading the applicant or were otherwise to prevent them from preparing a fair and accurate evaluation. However, the applicant did not allege that his supervisor or reporting officer for the second disputed OER had any particular bias against him or personal interest in downgrading him. Nor did he allege that one of them coerced the other into downgrading him.

10. In the absence of any allegations or evidence that the alleged romance gave the applicant's supervisor or reporting officer a personal interest in downgrading him or interfered with their ability to evaluate his performance, the Board finds that the applicant has not shown by a preponderance of the evidence that "a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raise[d] a substantial question whether the Reported-on Officer [received] a fair and accurate evaluation," as required by Article 10.A.2.g. of the Personnel Manual.

11. Finally, the Coast Guard argued that the applicant is not due relief because he did not take advantage of the opportunity to file replies to the disputed OERs in accordance with Article 10.A.4.h. of the Personnel Manual. The Board does not believe that the applicant's failure to reply at the time should deny him relief from any error the Coast Guard may have committed with regard to the OERs.

12. The Coast Guard conceded that the applicant's record would have been much stronger without the disputed OERs. The Board finds that the applicant's record would appear considerably stronger even with only the first disputed OER removed. Therefore, the Board finds the applicant's two failures of selection may have been caused by the presence in his record of the first disputed OER. The applicant's two failures of selection for xxxxx should thus be removed.

13. Therefore, the Board finds that the applicant is entitled to have the first disputed OER and his two failures of selection in 199x and 199x removed from his record. The remainder of the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of XXXXXXXX, USCG, is granted in part as follows:

- The OER covering the period from August 22, 199x, to July 15, 199x, shall be removed from the applicant's military record. It shall be replaced by one prepared "For Continuity Purposes Only" in accordance with the terms of Article 10-A-3 of the Coast Guard Personnel Manual (COMDTINST M1000.6A).
- All record of the applicant's failures of selection for xxxxx by the 199x and 199x selection boards shall be removed.
- If selected for promotion to xxxxx by the next selection board, the applicant's date of rank shall be the date that he would have been promoted had he been selected for xxxxx by the 199x board, and he shall receive back pay and allowances accordingly.

The remainder of the applicant's request is denied.

