

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1998-083

FINAL DECISION

[REDACTED]:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was commenced on May 12, 1998, upon the Board's receipt of the applicant's application for correction.

This final decision, dated March 25, 1999, is signed by the three duly appointed members who were designated as the Board in this case.

The applicant, a former lieutenant (LT) in the Coast Guard, asked the Board to correct his record by modifying two officer evaluation reports (OERs) for the periods June 1, 1996, to November 30, 1996, (first disputed OER) and December 1, 1996, to May 31, 1997, (second disputed OER). He also requested the removal of an OER for the period June 1, 1997, to April 14, 1998 (third disputed OER).

The applicant also requested that the three OERs covering the period from August 1995 to November 1996 should be corrected to make them more "readable". He submitted his text of how the OERs would look, if they were readable.

The applicant further requested that he be awarded severance pay and that any money taken from him as a result of punishment under Article 15 of the Uniform Code of Military Justice be returned to him. He also requested that he be given monetary relief to provide restitution for the Coast Guard's due process failure with respect to his separation proceedings. Finally, the applicant requested an apology from a representative of the Coast Guard for the difference in treatment it made between the applicant, a direct commissioned officer, and those officers who were academy graduates.

The applicant filed a civil action in the Federal District Court contesting his discharge. He alleged, among other things, a denial of due process with respect to the administrative discharge hearing, and he contested the refusal of the Coast Guard to grant him separation or severance pay. He also alleged that the Coast Guard defamed him in the disputed OERs. On January 27, 1999, the Federal District Court dismissed the applicant's claims. (For reasons

discussed later, this BCMR decision will address only the merits of the applicant's claims with respect to the disputed OERs.)

The applicant, a Reserve officer, began serving on active duty on July 24, 1995, pursuant to a four year active duty agreement. The applicant was involuntarily discharged on April 14, 1998, based on a recommendation of a discharge board that was later approved by the Secretary of Transportation.

EXCERPTS FROM RECORD AND SUBMISSIONS

Prior to filing his application with the BCMR, the applicant asked the Personnel Records Review Board (PRRB) for a modification to the first disputed OER. He withdrew that application and asked that those allegations be made part of this BCMR application.

The Applicant's Allegations

First Disputed OER (June 1, 1996 to November 30, 1996):

The applicant claimed that the comments in block 3.h. and block 9.f. that his CDO (command duty officer) qualifications were pulled, due to the senior watchstander's lack of confidence in his judgment were unfounded and inaccurate. He asked that they be removed from the disputed OER, and he stated that these comments were based on erroneous information about his performance as CDO on May 29, 1996, in that he failed to return a page for over an hour issued to him by a junior watchstander. The applicant stated that the instruction in effect at the time required that CDO's remain within a 45 minute response time, or no further than the CDO's home, if greater than 45 minutes in response time.

The applicant was the CDO on May 29, 1995. That day, around 0945, he was notified that that a crewman on one of the cutters was near death. The applicant stated that at approximately 1115 he received a report that the crewmember had died. At approximately 1130, he left the command to take members of his family to the airport. The applicant stated that he received two pages on his way to the airport. He was not able to answer them until he arrived at the airport at approximately 1205. He stated that CDOs were not equipped with cellular phones until approximately August 15, 1996. The applicant contended that he answered the pages in less than an hour's time. With respect to this event the applicant stated as follows:

I was informed that the deceased had been misdiagnosed the night before and was returned to duty whereupon he later suffered from breathing loss and collapsed the following morning. I was never given any information regarding the cause of the original misdiagnosis or the reason why the medevac helicopter was redirected to a different final destination upon making the pickup of the deceased. . . . As the bearer of bad tidings, I feel that it was extremely inappropriate for me to bear the brunt of the backlash that occurred from these events that were wholly beyond my control. My only duty was to provide reports to MLC personnel as necessary information became available so that the cognizant personnel specialist could respond to this event with the appropriate set of actions. Once these actions had been performed and the status was

conveyed back to the OPCEN [operation center], my duty was done. When I received the 1115 OPCEN call, I reported to [the necessary officials] that the individual in question had already been medically retired. This completed the extent of my required duties for this particular case.

The applicant submitted a copy of the CDO instruction that was in effect at the time. Section 3. of the instruction states that the CDO watch exists to provide around the clock support to the units within the Atlantic area. It further stated that the CDO shall serve as the single point of contact for the command and, acting in the name of the Commander, ensure timely action is taken in support of unit requirements.

Second Disputed OER (December 1, 1996 to May 31, 1997):

The applicant stated that the second disputed OER contained six false statements that he wished to have removed. They are:

1. The applicant "failed to complete assigned tasks he deemed unimportant; didn't update computer room master plan; missed initial and revised deadlines; and final product not acceptable." (The applicant stated that this project was initially assigned to a civilian. After the civilian left, he volunteered to maintain the plan. The applicant stated that the only instruction that he was given was to submit a particular file that showed all assignments. He stated that he attempted to review the plan with the SW team supervisor, but she was not interested at that time.)
2. The applicant changed supervisor's test plan without her knowledge. (The applicant stated that he served as the deputy to the SW3 supervisor (this was not the OER supervisor). Conflict arose between the applicant and the SW3 supervisor because each was giving conflicting instructions to a technician. The applicant stated that he was told that he would be the technician's supervisor. Notwithstanding, he stated that the SW3 supervisor continued to give instructions to the subordinate.)
3. The applicant's vision for using a trouble shooting package was out of sync with current realities and resources and his effort should have been focused on assigned tasks. (The applicant stated that the division commander asked the SW3 supervisor to have the applicant work on the trouble shooting project. The applicant stated that this was his main assignment and the reason that he was assigned to the SW3 team.)
4. The applicant "repeatedly has not considered or has underestimated the full impact of comments and actions. Could not be counted on to carry out orders when disagreeing with supervisor's plan or emphasis. Pursued own ideas on what was best for Coast Guard, although they may not have been in tune with the supervisor's direction. Made unauthorized changes to SW3 operating system setup despite repeated direct orders to have support staff present when making changes." (The applicant stated that these comments are false and are not supported by any examples. He stated that the SW supervisor wanted him on her team because she lacked the appropriate technical background. The applicant stated

that he made no changes to the SW3 operating system without specifically briefing both the SW3 supervisor and the support staff.)

5. The applicant had difficulty instilling confidence and trust needed to effectively direct others. In the presence of others he threatened a contractor and misrepresented himself in effort to coerce cooperation. (The applicant stated that the only incident identified in his review was the incident in which he expressed dissatisfaction at a waste of time involved with a testing procedure because of the technician's (contractor's) failure to use proper testing methods).

6. The applicant sometimes skirted or attempted to skirt the chain of command. (The applicant stated that one of the incidents spoken of here was that he retrieved his application package for flight school from his CO and gave it to another senior officer for endorsement. The applicant stated that he did so at the request of that senior officer.) The senior officer submitted a statement corroborating the applicant's statement about the flight officer package. In their responses to the applicant's reply to the OER, both the supervisor and the reporting officer state that the "skirted command" comment refers to incidences where the applicant inappropriately directed computer room staff and other personnel. The reporting officer cited another incident in which the applicant attempted to skirt the chain of command when he "attempt[ed] to acquire approval from different sources to install voice-activated software after his first and second-line supervisors told him, 'NO'." The applicant further stated that his action with respect to attempting to maintain enrollment in a Microsoft applications course were reasonable and were done without any intention to circumvent the chain of command.

The applicant stated that the first and second disputed OERs contained "colored language that creates inappropriate and unwarranted perceptions." The applicant stated that his achievements and activities were trivialized and made to appear to be less than substantial. He stated that the actions of his OER supervisor and reporting officer in trivializing his accomplishment were petty as evidenced by the command's attempt to bring criminal charges against him within two weeks after he filed a complaint with the Inspector General (IG).

The applicant offered the following as an example of the supervisor's pettiness. The applicant stated that prior to their OER relationship, he was nearly accosted by his supervisor when the supervisor demanded to know if the applicant had purchased a home on the waterfront in the Tidewater area and the amount of the purchase. The applicant stated that the supervisor also purchased a waterfront home, but at a higher cost than the applicant's home. The applicant stated that this was his first indication that serving under the supervisor was going to be an unpleasant experience.

The applicant claimed that he requested a change in job assignment to avoid working for the supervisor, but it was denied. The applicant alleged that the supervisor failed to provide him with useful counseling as to the supervisor's expectations of him. The applicant claimed that during their counseling sessions, the supervisor only talked about the core

values, honor, respect and devotion to duty. The supervisor failed to review any aspect of the applicant's accomplishment to determine when he was meeting the core value standard.

Third Disputed OER (June 1, 1997 to April 14, 1998):

The third disputed OER was prepared upon the applicant's detachment from his unit, covering the period June 1, 1997 to April 14, 1997. He asked to have the third OER removed. The following comments in block 8 are typical of the overall OER.

[The applicant] Demonstrated little/no initiative on CG-related work; failed to pursue assigned project objectives, discounted alternatives for solutions; . . . Habitually late to work despite repeated warnings from supervisor; started coming to work on time only after supervisor threatened disciplinary actions. Demeanor during phone call to local hotel was bullying; incident reflected poorly on service. Abusive attitude while dealing with PERSRU reflected negatively on member. Misused personal government calling card; made at least 100 personal unauthorized calls during this period, including 13 calls to parents' home (total 289 minutes) and numerous calls to prospective employers. Repeated same type of abuse on desk phone. Absent without leave--in addition to being late for work, returned home after being found "Fit For Duty" at sick call. Made false statement--when supervisor inquired about status, supervisor was informed by member that Medical Officer had recommended rest for remainder of day; Medical Officer contradicted this. Attempted to deceive supervisor on other occasions. Not trustworthy. Missed or arrived late to several Personnel Inspections.

The applicant claimed that this OER was nothing more than invective. The applicant stated that he believed there was one standard which applied to him with respect to work hours and schedules, and another which applied to civilian employees and other military members.

The applicant denied that he was absent from work without leave. He stated that on the morning of December 18, 1997, he left a message on his supervisor's voice mail, informing him that he would be home sick with the flu. The applicant stated that later that morning, he received a call from the supervisor. The applicant stated that the supervisor said that he had no problem with the applicant taking the day off provided that he go to sick call first. The applicant stated that he agreed to go to sick call and believed that he had the supervisor's permission for conditional sick in quarters (SIQ) conditioned on his visit to sick call.

During sick call, the applicant stated that the clinician told him that his virus, as well as the low back pain, could be related to his stressful environment. The clinician referred the applicant to the Employee Assistance Program, where he was evaluated by a counselor. The Counselor recommended to the applicant's command that the applicant be given a "more flexible work schedule" to accommodate his stress. The applicant attached a copy of the counselor's recommendation.

The applicant stated that prior to the evaluation by the counselor, he had requested an RDO (regular day off) to help relieve his work-related stress. This request was denied by his supervisor. The applicant claimed that the treatment he has received from his supervisor

with respect to his request for an RDO has been inconsistent with treatment afforded to others who were permitted to select their reporting time for their work schedules.

The applicant stated that after he returned to work from SIQ, he agreed at the request of his command, to seek a medical examination from two doctors that had been recommended by the command. The doctors' referred the applicant to a military psychologist. The applicant stated that the psychologist told him that she could not evaluate him because the instruction from his command for him to get a medical evaluation was inappropriate.

The applicant related another incident that he believed showed bias against him by his supervisor. He stated where he was unfairly placed on report for being absent from work even though he had informed his supervisor that he was having periodontal surgery. He attached a doctor's note informing the applicant's command that he should be excused from duty for the period February 9, 1998, to February 16, 1998.

Other Statements Submitted by the Applicant

1. The applicant submitted a statement from a civilian who worked with him on the SW3 team project. This individual stated that after she performed some preliminary work, the assignment was to be turned over to another civilian employee. Subsequently she stated that the SW3 supervisor decided to assign the project to the applicant because he had more experience. The civilian stated that several weeks later, she heard that the team developing the SW3 project had been dissolved because another unit was assuming responsibility for it.

2. The applicant submitted a copy of an e-mail message from a CWO4 (chief warrant officer - W4) that was sent to a person other than the applicant. The e-mail was sent on February 5, 1998. The CWO4 stated that he applied for the RDO program and was allowed to participate in it. He stated that he was permitted to choose his starting time.

3. The applicant also submitted a statement from a person who served as his OER supervisor from September 1995 through October 1995. This person stated that the applicant was eager to learn and took and gave direction well. This person also stated that the applicant was an able manager of the three employees he later supervised.

Views of the Coast Guard

The Chief Counsel of the Coast Guard recommended that the Board dismiss this case for issue preclusion because the issues before the Board were recently litigated in Whitemore v. Janet Reno, et al, Case No. 2:98cv 101. Alternatively, the Board should dismiss the case for lack of merit. In addition to the other allegations in the federal complaint, the Chief Counsel stated that the applicant made specific allegation with respect to the OERs.

The Coast Guard submitted comments from the Commander, Coast Guard Personnel Command (CGPC), addressing the allegations raised by the applicant with respect to the disputed OERs. The Commander recommended that no relief be granted to the applicant.

CGPC stated that the applicant failed to show that the comments in the first disputed OER with respect to the loss of the applicant's CDO qualifications were in error or unjust. Both the supervisor and reporting officer confirm that the senior watch officer had lost confidence in the applicant's ability as a CDO. (Both the supervisor and reporting officer submitted statements.)

With respect to the second disputed OER, CGPC stated that the supervisor and reporting officer affirmed their evaluation of the applicant's performance, i.e., that the applicant failed to follow directions, failed to complete assigned tasks; and had poor interpersonal skills.

Regarding the applicant's lack of adequate counseling by his supervisor, CGPC stated that if the applicant did not receive what he considered to be adequate performance feedback, he was obligated to seek further counsel or clarification of his own volition. In a written statement attached to the advisory opinion, the supervisor stated that "[he and the applicant] discussed core values, ways [the applicant] might have handled situations better, personal growth and other such manners (sic)."

CGPC stated that the applicant offered nothing to support his allegation that the third disputed OER was "rank invective." With respect to the allegation that the third disputed OER was given to the applicant in retribution for filing a complaint with the Inspector General, CGPC relied on the supervisor's comment that he was aware of the applicant's IG complaint, but it had nothing to do with the applicant's areas of responsibility. The supervisor stated that he was not interested in the complaint, but rather in the applicant's progress on tasks that he had assigned to him.

CGPC stated that at the time the applicant filed the complaint with the IG, he already knew that action had been initiated to separate him from the Coast Guard. The applicant was informed of this by letter on January 9, 1998. He stated that earlier, on December 9, 1997, the applicant requested a release from active duty. Therefore, argued CGPC, "the personnel action in question - an OER - that was below the good performance of a "4" had no impact on the applicant who was already being separated from the service."

CGPC attached a statement from the supervisor and one from the reporting officer. In addition to the comments above, the supervisor stated that he did not approve the applicant's request for an RDO because the applicant was not completing his assigned work and he did not report for work on time. He further stated that he initially approved the RDO request with the stipulation that the applicant start to work at 0700, to provide an overlap of their schedules. The supervisor stated that this was not acceptable to the applicant.

In his statement, the reporting officer wrote the following:

I strongly believe [the applicant's] evaluations consistently reflected fair and accurate assessments of his performance. Early OER's reflected potential borne of his demonstrated technical expertise. Peccadilloes resulting from difficulty dealing with others were understated or dropped off the earliest formal evaluations in the hopes that he would improve in this area, thus remaining competitive for advancement. With time, [the applicant's] substandard manner of dealing with co-workers approached unacceptable levels and ultimately, was reflected in his job performance.

Applicant's Response to the Views of the Coast Guard

On March 4, 1999, the Board received the applicant's response to the views of the Coast Guard. The applicant stated that he did not ask the federal district court to review his military record for correction. He stated that he explained to the Court that he had submitted the issue of record correction to the BCMR, and the correction matter was not litigated in federal court, and therefore, the applicant argues that collateral estoppel was not relevant in this case.

Concerning his CDO qualifications, the applicant stated that he had to wait six months before he could re-qualify for the CDO watch. He stated that he stood the necessary five watches to re-qualify for the watch, but the supervisor refused to forward the applicant's memorandum requesting to be placed back on the watch bill.

The applicant stated that his supervisor did not normally come into the office until 0730, therefore his statement that he initially approved the applicant's request for an RDO with the stipulation that his day start at 0700 so that their schedules overlap -- was in actuality an excuse for justifying the denial of the RDO request.

The applicant provided the following with respect to the supervisor's comments about the IG submission and allegation that he did not receive adequate counseling:

[The supervisor] has said in his 26 January 1999 declaration that he only first learned of the DOT IG report in January 1998. However, I started working on it as early as October of 1997 and those materials were frequently left in plain sight. . . . On or about [12 January 1998], I asked [the supervisor] if he would care to review my [IG] report and he indicated that he was not interested in reading the report because it was of no value to him. I did in fact request beginning of period and mid-period OER meetings. After the . . . division's former deputy retired, I was not successful in getting [the supervisor] to fit me into a schedule for a meeting. Once [the deputy chief] retired, [the supervisor] found excuses for postponing or canceling the meetings..

The applicant stated that as a direct commissioned officer he was never accepted as a member of the Coast Guard's social groups. He stated that he was left out of conversations and certain informal social gatherings. He stated that he was frequently brushed off. The applicant stated that this treatment took a toll on his personality.

Whitmore v. Janet L. Reno, et al, Case No. 2:98cv 101

On January 27, 1999, the court dismissed the above entitled action and on February 21, 1999 issued an opinion and order setting forth the court's reasons for the dismissal. The court summarized the applicant claims as follows:

In his complaint, the petitioner requests a writ of habeas corpus to "make restitution for the injuries and damages he has suffered from the Coast Guard" and to force respondents to release him from his military service. First, petitioner claims that he was deprived of his due process rights when he was involuntarily discharged from the Coast Guard. He claims that he was deprived of his due process rights by not being allowed to appear at the administrative discharge hearing. Second, petitioner claims that he was denied fair and equitable severance pay benefits and that this represents discrimination on the part of the Coast Guard. Third, petitioner claims that he was retaliated against for his conscientiousness. According to petitioner, this retaliation took the form of unfavorable and inaccurate comments placed in his official records, and he is suing under the Federal Tort Claims Act and 42 U.S.C. § 1983. Fourth, petitioner alleges that he had made several Freedom of Information Act ("FOIA") requests which he says have been denied through the application of "FOIA" processing fees. Id. at 3.

The court dismissed the applicant's habeas corpus claim, finding that it was moot. The court stated that "petitioner was discharged from the Coast Guard without the use of the writ, since the Court did not begin to consider petitioner's claim until he submitted his revised, all-encompassing complaint/petition on May 4, 1998. A writ of habeas corpus does not lie for someone who has already been discharged from the military." Id. at 5.

The court dismissed the applicant's due process claims, finding that the applicant did not have standing to bring such a claim because "he has not alleged that he suffered any injury by his being discharged from active duty." The Court further stated:

It is true that [the applicant] was discharged as a result of the Coast Guard's proceedings; however, he does not dispute the Coast Guard's justification for discharging him. The United States Supreme Court has stated that "procedural due process rules are meant to protect persons not from the deprivation but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). Petitioner does not allege that his discharge was unjustified. Nor does he allege that his discharge was mistaken. Further, even if petitioner could meet the injury and causation prongs of the standing requirement, he could not meet the addressability prong. Petitioner has not asked to be reinstated into the Coast Guard. Therefore, the Court could order no relief which would redress petitioner's alleged injury. Id. at 7.

The court dismissed the applicant's claim for severance pay finding that he was not statutorily entitled to such pay. The Court stated that the law does not provide for severance pay benefits for Reserve officers. The Court stated that 14 U.S.C. § 327(a) provides that the Secretary has the discretion to authorize payment of severance pay to officers of the Regular Coast Guard, not to Reservists. The Court also found that the applicant was not entitled to separation pay under 10 U.S.C. § 1174, because this provision limits separation pay to those

Reserve officers who have completed six or more years of active service. The applicant's active duty agreement was for four years, of which he completed only about two and one half years.

The court dismissed the applicant's FTCA claim that the Coast Guard caused inaccurate and defamatory comments to be placed in his record. The Court stated that pursuant to 28 U.S.C. § 2608(h), the FTCA's waiver of sovereign immunity does not apply to claims arising out of libel, slander, or misrepresentation. The court also stated that the "United States Supreme Court has ruled that the government cannot be held liable under the FTCA for injuries to United States servicemen arising out of or in the course of activity incident to military service. Feres v. United States, 340 U.S. 135 (1950)." Id. at 10.

The court dismissed the applicant's FOIA claim without prejudice, because it was not ripe. The FOIA request is under appeal at the Coast Guard.

In February 1999, the applicant filed a Notice of Appeal with respect to his due process claim and his severance pay claim.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application is timely.
2. The Chairman has recommended that the case be determined without a hearing. 33 CFR 52.31. The BCMR concurs in that recommendation.
3. The Board will not consider the issue of severance pay or separation pay because a federal district judge has already determined that the applicant is not entitled to either under the law.
4. The Board will not consider the applicant's claim that he was denied due process in his administrative discharge hearing because the federal district court has already heard and dismissed that claim. That court determined that the applicant did not have standing to bring such a claim because no injury was alleged. The court further stated that even if the applicant could meet the injury and causation factors to have standing to bring this claim, it would still fail because of a lack of a remedy. The applicant did not request that the Court or this Board reinstate him in the Coast Guard. The applicant did not allege before the Court or before this Board that his discharge was not justified, nor did he allege that it was a mistake. In fact, the applicant had requested to be discharged prior to the initiation of administrative discharge proceedings. Therefore, the Board will accept the ruling of the Court on this issue and finds no basis for reconsideration of the due process claim. Moreover, since the

applicant has filed a notice of appeal with respect to the due process and pay claims, the Board finds that it should not interfere in that process.

5. The Board will, however, consider the applicant's challenge to the disputed OERs. The Court did not consider the merits of the applicant's claim with respect to the accuracy of the OERs. It dismissed the applicant's OER complaint on the ground that the applicant could not challenge them under the FTCA. The applicant claims that these OERs are inaccurate, a matter clearly within the purview of this Board.

6. The applicant has failed to demonstrate that the two comments about the removal of his CDO qualification were in error or unjust. These comments were properly placed in his OER because his CDO qualifications had been removed by the senior watch officer during the reporting period. The comments also represented the rating chains judgment about his abilities in this particular area.

7. The applicant stated that these comments were based on one incident, wherein he left the command, to take a family member to the airport at a time when a crewmember of a ship under his responsibility, was either dying or had died. He stated that by the time he left the command the crewmember had already expired and there was nothing more for him to do, since he made all necessary reports. Apparently, he was needed for something more because he was beeped on his way to the airport, but could not return the call until he arrived at the airport approximately 45 minutes later. The death of a sailor is a critical time for a command. Whether the applicant exercised good judgment at that time is a legitimate area for the rating chain to comment on. Even if the removal of the applicant's CDO qualification were based on this one incident, the Board cannot say that the removal of the applicant's CDO qualifications by the senior watch officer because of a loss of confidence in the applicant was in error or unjust. Therefore, it was proper to comment on it in the applicant's evaluation.

8. The applicant has not demonstrated by a preponderance of the evidence that the second disputed OER, containing the alleged six inaccurate comments, is in error or unjust. In response to the comment that the applicant failed to complete assigned tasks . . . , the Board finds no error or injustice. Although the applicant produced evidence to corroborate that the SW3 assignment was initially assigned to a civilian, both he and the witness agree that the project was subsequently assigned to him. The fact that he volunteered for the project is irrelevant to his performance in the job. It was proper for the command to comment on his performance with respect to that project. He has only presented his views that he did not miss deadlines with respect to the project(s) or that the final product was an acceptable one.

The Board also finds that the applicant has failed to prove by a preponderance of the evidence that the following comments are inaccurate: (1) He changed the supervisor's test plan without her knowledge. (2) His vision for using a "trouble shooting" package was out of sync with realities and resources; his efforts should have been on assigned tasks. (3) He repeatedly has not considered or has underestimated the full impact of comments and

actions. . . . (4) He had difficulty instilling confidence and trust in him or that he threatened a contractor in the presence of others The applicant only submitted his views with respect to the inaccuracy of these comments. That evidence is insufficient to cause the Board to find the comments to be in error or unjust.

The applicant claims that the sixth disputed comment that he skirted or attempted to skirt the chain of command is inaccurate or unfair because he was asked by a senior officer to submit the package to him for a recommendation without going through his command. The applicant has submitted a statement from that senior officer corroborating the flight package event. However, the supervisor and the reporting officer both state that the "skirted command" comment refers to incidences where the applicant inappropriately directed computer room staff and other personnel. The reporting officer cited another incident in which the applicant attempted to skirt the chain of command when he "attempt[ed] to acquire approval from different sources to install voice-activated software after his first and second-line supervisors told him, "NO." Therefore, the Board finds that the applicant has not demonstrated that this disputed comment refers only to the flight package endorsement. The supervisor and reporting officer both stated that the comment refers to other matters. The applicant has not shown this comment to be in error or unfair.

9. The applicant has failed to prove that the third disputed OER contains "rank invective" on the part of the supervisor. To prove this, the applicant attempts to demonstrate that he was treated differently from other officers who served under the supervisor. One example of the different treatment offered by the applicant is the disapproval by the supervisor of the applicant's RDO request, while permitting others to select their RDO and starting times. However the supervisor stated that he did approve an RDO for the applicant with a 0700 starting time so that his and the applicant's work hours would overlap. This was necessary because of his need to supervise the applicant. This plan was not acceptable to the applicant and, therefore, the applicant did not have an RDO. The denial of an RDO for the applicant does not prove that the supervisor was biased in evaluating the applicant's performance in the third disputed OER. It was up to the supervisor, not the applicant, to determine work schedules and times.

Another incident offered by the applicant to show that the supervisor was biased against him in the OER was the comment that the applicant was absent without leave. The applicant claimed that this disputed comment was based on an event where he thought the supervisor had approved SIQ for him after a sick call visit for the flu. However, the reporting officer wrote in the OER that the medical officer found the applicant fit for duty that day, but the applicant told the supervisor that the medical officer had recommended that he rest for the remainder of the day. The applicant has failed to show by a preponderance of the evidence that the comment -- he was absent without leave -- even if based on the SIQ incident, is inaccurate. Moreover, the disputed comment is also supported by the reporting officer's statement that the applicant was "habitually late for work" and that he missed or arrived late to several personnel inspections. He has failed to show that the supervisor was biased against him in the disputed OER. The third disputed OER is a below average OER. However, the applicant has not demonstrated that it was in error or unjust.

10. The applicant has not established that any member of his rating chain took retribution against him in any of his OERs for filing a complaint with the IG. He merely made the allegation, but submitted no proof, with respect to retribution, other than his own statement.

11. The applicant has failed to demonstrate that he was not adequately counseled about his performance. There is sufficient evidence to establish that the applicant was counseled about his performance. Both the applicant and supervisor stated that there were counseling sessions about the applicant's performance.

12. The Boards finds that the applicant's request that three of his earlier OERs be rewritten so that they are more readable is without merit. Those OERs were prepared in accordance with the regulations and are not in error or unjust. The Board has no justification to order any corrections to them.

13. Accordingly, the applicant's requests for relief should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

