

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2002-015

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

 **Deputy Chair:**

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 January 7, 2002, upon the BCMR's receipt of the applicant's completed application.

This final decision, dated April 30, 2003, 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 asked the Board to correct his military record either by raising two evaluation marks he received from 3s to 4s, or higher, and removing the supporting comments in an officer evaluation report (OER) he received for the period July 16, 1998, through May 28, 1999, or by removing the entire OER from his record.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On July 19, 1995, the applicant, a xxxxxxxxxxxxxxxx, accepted an appointment as a lieutenant (O-3) in the Coast Guard Reserve and began serving on extended active duty. Previously, he had served as a captain (O-3) in the Air Force Reserve for several years.

From July 21, 1995, to May 31, 1996, the applicant served as a project officer in the xxxxxxxxxxxxxxxxxxxx Division of a Support Center. He received two OERs in this position. On the first, his performance was described as "excellent" and he was recommended for integration into the regular Coast Guard and for positions of greater responsibility. He received sixteen marks of 4 (on a scale of 1 to 7, with 7 being best) and six marks of 5 in the various performance categories, several complimentary com-

ments, and a comparison scale mark of 4.¹ On the second OER, he received six marks of 4, thirteen marks of 5, and four marks of 6 in the performance categories, many positive comments, and another 4 on the comparison scale. In addition, he was recommended for promotion with his peers and for more challenging xxxxxxing positions.

In June 1996, the applicant became the Assistant Chief of the xxxxxxxxxxxxxxxx Division at the Support Center, supervising 77 members and employees. On the OER he received in December 1996, he received four marks of 4, thirteen marks of 5, and six marks of 6 in the performance categories, many positive comments, and a comparison scale mark of 5. In addition, he was "heartily recommended for integration & promotion" and for "challenging leadership assignments." On the OER that he received in June 1997, by which time he had been serving as acting chief of the division for two months, he received one mark of 4, sixteen marks of 5, and six marks of 6 in the performance categories, many positive comments, and a comparison scale mark of 5. In addition, he was "strongly" recommended for integration and promotion.

In September 1997, a new division chief was appointed, and the applicant became the Chief xxxxxxxxxxxxxxxx in the division, supervising 16 military and 57 civilian employees. On the OER that he received in July 1998, he received thirteen marks of 4 and five marks of 5 in the performance categories and a comparison scale mark of 4. Many of the comments in this OER are guardedly positive, mediocre, or negative. The reporting officer noted that the applicant had been "placed in a very difficult and challenging situation as acting Division Chief for an extended period of time, a job that demands the full attention/experience of a CDR [commander]." He described the applicant as a "very capable xxxxxxxx with an extremely solid work ethic" but did not include a recommendation for integration or promotion.

In July 1998, the applicant was transferred to the Xxxx xxxx Xxxxx to serve as Chief of the xxxxxxxx Branch. His branch was part of the xxxxxxxxxxxxxxxx Division, which was overseen by the xxxxxxxxxxxx (ZZ), a commander. His direct supervisor, Mr. G, was a civilian who reported to the ZZ. As branch chief, the applicant supervised three civilian employees: two xxxxxxxx inspectors, Mr. A (GS-9) and Mr. B (GS-11), and a secretary, Ms. C (GS-7).

The first OER the applicant received as branch chief is the disputed OER in this case. On it, he received a mark of 3 for the performance category "Evaluations"² from

¹ The comparison scale is not actually numbered. However, there are seven possible marks on the OER form from 1 (unsatisfactory performer) to 7 (best officer of this grade). A mark of 3 on the scale denotes an "excellent performer; recommended for increased responsibility." A mark of 4 denotes an "exceptional performer; very competent, highly respected professional." A mark of 5 on the scale denotes a "distinguished performer; give tough, challenging, visible leadership assignments."

² The "Evaluations" category is defined as the "extent to which an officer, as Reported-on Officer and rater, conducted or required others to conduct accurate, timely evaluations for enlisted, civilian and officer personnel." The OER form indicates that to merit a mark of 4 in this category, an officer must meet the following standard: "Reports consistently submitted on time. Narratives were fair, concise and

his supervisor, Mr. G, and a mark of 3 for “Judgment”³ from his reporting officer, the ZZ. The applicant also received seven marks of 4, nine marks of 5, and a comparison scale mark of 4. On the first draft of this OER, which was provided to the applicant in July 1999, no negative comments supported the marks of 3. Instead, the comments indicated that he “[s]et high standards for his personnel and provided means to accomplish same” and “[a]ttempted to seek out recommendations and opinions of others before acting on sensitive personnel issues.”

The draft OER was initiated by the applicant on May 11, 1999; signed by Mr. G on June 3, 1999, by the ZZ on June 30, 1999, and by the reviewer, CDR I, on July 14, 1999; and forwarded to the Coast Guard Personnel Command (CGPC). On August 23, 1999, CGPC rejected and returned the OER, stating that the OER

contains deficiencies that must be corrected before it will be accepted into the officer’s record. ... The marks awarded in [Sections 5 and 8] are not adequately supported by the comments in the OER. It is not clear how the Reported-on Officer failed to meet the “4” standard. ... Provide either specific performance observations which indicate how the officer was less successful than the “4” standard or adjust the mark to align with the information already provided in the OER. ... Please return a revised OER and one photocopy to the Coast Guard Personnel Command ... within thirty days of the receipt of this letter.

The revised, final version of the disputed OER was received by CGPC on October 13, 1999. It contains most of the positive comments contained in the draft, and a few positive words, such as “excelled” and “consistently,” have been added to the text to support the performance category marks above 4. The mark for the category “Developing Others,” however, had been lowered by the supervisor from a 6 to a 5. In addition, the mark of 3 for the category “Evaluations” is supported by the following comment: “Submission of civilian evaluations were [sic] not timely and had inaccurate/insufficient comments. Evaluation narratives were of poor quality and required substantive revisions by supervisor before submission.” The mark of 3 for the category “Judgment” was supported by the following negative comment: “Judgment on some sensitive personnel issues & interactions w/ others sometimes missed the mark—often required involvement or intervention of superiors to adequately resolve/remedy problems.” The final version of the OER shows May 19, 1999, as the date Mr. G signed, June 30, 1999, as the date the ZZ signed, and October 5, 1999, as the date the reviewer signed.

contained specific observations of action and impact. Assigned marks against standards. Few reports, if any, returned for revision. Met own [officer evaluation system] responsibilities as Reported-on Officer.”

³ The “Judgment” category is defined as the officer’s “ability to make sound decisions and provide valid recommendations by using facts, experience, common sense, and analytical thought.” The OER form indicates that to merit a mark of 4 in this category, an officer must meet the following standard: “Demonstrated analytical thought and common sense in making decisions. Used facts, data, and experience and considered the impact of alternatives. Weighed risk, cost and time considerations. Made sound decisions promptly with the best available information.”

Neither the draft OER nor the final version contains a recommendation for promotion or integration, but the ZZ wrote that, “[w]ith additional experience and exposure to CG processes/procedures, he should be suited to major project management duties at FDCC or comparable staff positions.”

On the applicant’s next OER as chief of the xxxxxxxxxxxx Branch, covering the period May 29, 1999, to July 31, 2000, he received six marks of 4, twelve marks of 5, and a comparison scale mark of 4. His supervisor was still Mr. G, and CDR I was still the reviewer, but the new ZZ, another commander, served as the reporting officer.

On August 1, 2000, the applicant was released from active duty into the Reserve. His record was reviewed by the Reserve LCDR selection boards in 2000 and 2001, but he was not selected for promotion by either board. In 2002, he was released from the Coast Guard Reserve to accept a commission in the Air National Guard.

SUMMARY OF APPLICANT'S ALLEGATIONS

The applicant alleged that the two marks of 3 he received for the performance categories “Judgment” and “Evaluations” in the disputed OER are inconsistent with his actual performance and with statements made by his supervisors and others who had opportunity to witness his performance.

The applicant stated that, soon after arriving at the Xxxxx, he learned that one of his subordinates, Mr. A, had a lawsuit pending against the Xxxxx, naming the applicant’s predecessor as branch chief; his supervisor, Mr. G; and his reporting officer, the ZZ, as defendants who allegedly harassed, discriminated, and retaliated against Mr. A. He alleged that Ms. C had also filed several “actions” through her union against Mr. G. Moreover, he learned that Mr. G had been a defendant in at least one and possibly two lawsuits filed by former employees, who had alleged harassment, discrimination, and retaliation. The applicant stated that he never met the two former employees who had filed the lawsuits, but “the adverse OER marks that [he] received are a direct reflection of the poison that remained in the office after their departure.” He alleged that the atmosphere of the office was “tense, polarized, and stressful.”

The applicant stated that in response to this news, he stayed neutral and tried to form independent opinions of his supervisors and subordinates. However, he became convinced that his supervisor, Mr. G, “was largely responsible for the hate, discontent and subversive nature” in the office. He alleged that there was constant fighting and that Mr. G and Mr. B were aligned together against Mr. A and Ms. C.

The applicant stated that Mr. A and Mr. B “were both competent at their jobs.” However, Mr. G “tried to convince [him] that [Mr. A] was incompetent.” He alleged that Mr. G criticized Mr. A for “minor indiscretions that were largely ignored when committed by others.” He routinely saw Mr. G display “hostile and disparate treat-

ment" toward Mr. A and sometimes toward Ms. C. Mr. G tried to pit Mr. B and Mr. A against each other and resented the applicant's refusal to "buy into this tactic."

The applicant stated that in October 1998, three months after assuming his position, he sent the ZZ a memorandum expressing concern about the "hostile, subversive and threatening comments and actions" of Mr. G, including threats of physical violence that were seemingly in jest. However, the ZZ dismissed his concerns, stating that the applicant had only been at the branch for three months and that he "misunderstood" Mr. G. When the applicant complained about Mr. G's abusive and offensive language, the ZZ told him he was "hearing things." The applicant also alleged that the ZZ "made no discernable effort to ease the tension" in the office.

The applicant stated that he worked to the best of his ability and regularly met with each of his subordinates to discuss performance expectations. He submitted copies of mid-period evaluations that he provided to his employees even though they were not required. In April 1999, Mr. G asked him to complete their performance evaluations for the year ending March 31, 1999, and "strongly suggested" that he mark Mr. B at the "meritorious" level. Because Mr. A's performance was at least as good as, if not better than, Mr. B's (since Mr. A "made fewer administrative mistakes and seemed to keep a tighter rein on his assigned Contractors"), he also rated Mr. A at the "meritorious" level. He did this not because he believed that either employee clearly deserved that mark but because, in light of their relatively equal performances, it would be unfair to mark one "meritorious" and the other merely "proficient."

The applicant alleged that he went to the ZZ with his concerns about the evaluations and Mr. G's instructions, but the ZZ would not address the problem and told him just to evaluate his subordinates as he saw fit. He therefore initially rated Mr. A and Mr. B at the "meritorious" level and Ms. C at the "needs improvement" level. He thought that Ms. C merited that rating because she continually ignored his requests to complete administrative work. However, he then learned that she was ignoring his requests because Mr. G had told her to do so in order to give his own requests priority. The applicant alleged that Mr. G's actions would not have caused a problem if he had told the applicant what he had done. However, Mr. G rarely told the applicant that he had told Ms. C to delay his work, and Mr. G often told Ms. C that he had so informed the applicant. In this way, Mr. G created unnecessary friction and misunderstanding between himself and Ms. C, which was ultimately resolved when she complained about it to her union. The applicant alleged that when he left the office, he was on very good terms with Ms. C and the union president.

The applicant alleged that Mr. G returned all three evaluations to him and told him they were unacceptable because the ratings did not match his perception of the employees' performance. He asked the applicant to revise the evaluations within a couple of hours. Therefore, the applicant decided to rank all three of his subordinates as "proficient" and to include no comments at all. Before revising the evaluations, how-

ever, he consulted with CDR S, the second highest ranking person in the division. CDR S expressed doubt about the wisdom of not including comments but concurred that, under the guidelines for evaluating civilian personnel, a supervisor could mark someone as “proficient” without adding comments. The applicant alleged that he then consulted LCDR Y, the attorney who was defending the Xxxxx against Mr. A’s lawsuit. LCDR Y told him that since the case would be going to trial soon, the less said on the evaluations, “the better for us (the lawyers).”

The applicant stated that this comment by a Coast Guard attorney convinced him that “making no comment on this round of civilian appraisals was an appropriate and allowable course of action.” Therefore, he rated all three subordinates as “proficient” and included no comments, as allowed by the regulations. He alleged that he did so “against [his] better judgment” because, over the past year, his subordinates had frequently twisted words and used innocent comments against their supervisors. He also alleged that because of the “cloud of a federal lawsuit, regular visits to the legal office, fabricated union grievances and mind numbing control games by [Mr. G] and [his] own subordinates, the option to make no comment was a wise one.”

At a meeting soon thereafter, Mr. G and the ZZ indicated that they disagreed with his decision and told him that the lack of comments “might not be well received” by the employees. However, since they did not tell him that it was a major concern, he stood by his decision. The applicant stated that if Mr. G or the ZZ had asked him to add comments, he would have done so, but they never requested it. When the ZZ asked him if he thought it was fair to the employees not to include comments, the applicant told him that “under the circumstances, the employees, the lawyers, their union stewards and a pending court date ... there were few comments that I needed to add or was required to make.” At that point, he alleged, he was not given a chance to add comments. Instead, Mr. G took the evaluations, said he would add comments, and left. The ZZ told the applicant that he questioned his judgment in including no comments. The applicant alleged that the ZZ must have been unaware that no comments were required for “proficient” evaluations, that he had consulted the Xxxxx’s attorney and CDR S, and that the attorney had suggested that “the less we say, the better.”

The applicant stated that he was never expressly asked to add comments. He stated that Mr. G ultimately added “a few meaningless sentences” to each evaluation, but the overall marks remained “proficient.” Moreover, he was never told that Mr. G and the ZZ would adversely evaluate him for not including comments. He alleged that this was the only time his judgment was ever called into question.

The applicant alleged that the disputed OER is erroneous in that it states that his evaluations for his three subordinates were late. He submitted copies of the evaluations, which show that both he and Mr. G signed them on April 26, 1999—well within the 60-day period for completing civilian evaluations.

The applicant's own evaluation period ended on May 28, 1999, after which the ZZ was transferred to another station, and Mr. A's lawsuit was settled. In late July 1999, the applicant stated, he received one version of his OER with the marks of 3 for "Judgment" and "Evaluations" but no supporting negative comments. In October 1999, he received the final version of the OER with new derogatory and inaccurate comments that "vaguely" supported the low marks. Since the latter version indicates that Mr. G signed it on May 19, 1999, whereas on the July version, Mr. G's signature was dated June 3, 1999, the applicant alleged that it may be that the better comments that appear in the "draft" OER were supposed to constitute the final version. He also alleged that the reviewer unduly delayed his review of the draft and the final OERs.

The applicant stated that the reviewer of the disputed OER, CDR I, had little or no opportunity to observe his performance and should not have concurred in the OER by signing it. He alleged that he never knew CDR I was a member of his rating chain, since the ZZ reported to the Xxxxxx Xxxxxxxxxxxx of the Xxxxx.

The applicant alleged that even if Mr. G and the ZZ were right to criticize his judgment in not adding comments to the evaluations, it was wrong for them to base his marks for the whole evaluation period on this one incident. He alleged that apart from this incident, his judgment and ability to evaluate his subordinates were never criticized. The applicant argued that because comments were not required by regulation, his performance fell within the guidelines, and he should not have received the low marks. He alleged that he was never advised that his judgment was in question or given an opportunity to correct his rating chain's misperception.

The applicant noted that when he applied for an extension of his active duty contract in January 1999, the middle of the evaluation period, the ZZ strongly recommended approval. The ZZ's strong endorsement, he alleged, is inconsistent with his receipt of a mark of 3 in judgment for his performance during the whole year. He also pointed out that he received an "Officer of the Day" award from the Xxxxxx Xxxxxxxxxxxx on January 25, 1999. The citation for the award states that it is "[i]n recognition of [the applicant's] judgment and professional abilities." Moreover, the applicant pointed out, he received an Achievement Medal at the end of his tour for "superior performance" and "diligence, perseverance and devotion to duty ... from July 1998 to July 2000."

The applicant argued that, as a junior officer, his career should not suffer because of legal actions by his subordinates against his superiors over issues that arose before he was assigned to the unit. He alleged that in the eyes of his supervisors, "failure to take their side meant that [he] sided with the employee." He alleged that the Coast Guard forced him to act as a witness against both his subordinate, his supervisor, and the Coast Guard. He argued that, judging by the OER he received, it seems that he was expected to lie to save his career. He argued that he should not have been punished with low marks after having been ordered by his supervisor to give one subordinate

higher marks than he deserved and after correspondingly raising the marks of an equally competent subordinate whom his supervisor detested.

The applicant alleged that he refrained from filing a reply to the OER because Mr. G was still his supervisor, and so he feared retribution. In addition, he alleged that after he left active duty in July 2000, he failed twice to be selected for promotion to lieutenant commander. He alleged that those failures were "certainly and adversely influenced" by the low marks he received on the disputed OER.

The applicant asked the Board for an opportunity to appear before it and answer any questions the Board members might have.

SUMMARY OF APPLICANT'S DOCUMENTARY EVIDENCE

The applicant submitted the following statements and copies of his own notes and correspondence, which, he alleged, prove the ongoing hostile attitude of his superiors and subordinates and the fact that he showed good judgment and provided his subordinates with proper counseling and evaluations:

1. The applicant submitted a copy of a memorandum from himself to the ZZ dated October 23, 1998. In it, he expressed concern about supervising someone who had already filed a complaint against the command and reporting to the person (Mr. G) against whom the complaint was made. The applicant stated that upon his arrival, his predecessor told him that the Xxxxxxxx had "a horrible civilian work force," that his subordinates were incompetent and lazy, that he should "watch his back," and that he should not trust Mr. G. He stated that he had tried to remain neutral during his first three months. However, he had recently received a call from a private attorney and was growing concerned. He stated that the work environment was hostile, with people being publicly discredited and feeling threatened and intimidated. He stated that he himself was concerned about mentioning the problems to the ZZ "for fear of retaliation." He alleged that Mr. G knew of his concerns and was attempting to discredit him. The applicant asked that he be allowed to report directly to the ZZ instead of to Mr. G or that he be transferred to another office.

2. A copy of an undated email⁴ from the applicant to LCDR Y, the attorney, stating that he had received a telephone call from a civilian attorney and was "very concerned about being placed in the middle of this matter, and the potentially harmful impact that telling the truth, about [his] observations, may have on [his] career."

3. In an undated note to himself, the applicant stated that, after receiving a call from an "outside attorney," he had informed both LCDR Y and the ZZ. The ZZ questioned whether the "outside attorney" should be calling the applicant and warned him

⁴ Because the email has no "from" line and no time and date line, it is unclear if or when it was sent.

that the attorney might try to get the applicant's opinion as to whether there was a hostile work environment. In the same breath, the applicant noted, the ZZ told him that there was no hostile work environment. The applicant noted that he said nothing although he disagreed strongly with that statement. He noted that he felt sick about having to be deposed on the subject in the near future because he thought that Mr. G would retaliate against him.

4. An email message dated October 26, 1998, from LCDR Y to several members of the division, including the applicant, notes the schedule for witness interviews for Mr. A's case against the Xxxxx.

5. In a note to himself dated December 15, 1998, the applicant stated that he had first noticed the smell of alcohol on Mr. A's breath in early October but took no action. When he noticed it again in late October or early November, he asked Mr. A if he smelled the odor of alcohol. Mr. A replied, "No, it's not me" and stated that he might have body odor since he did not have time to shower that morning. The applicant further stated that in late November, Mr. A arrived at work incoherent, with bloodshot eyes, and smelling of alcohol. When questioned, Mr. A stated that he would never do anything like that to jeopardize his job and suggested that it might be his aftershave. The applicant sought the advice from the personnel office, noting that Mr. A was an inspector who had to work on xxxxxxxxxxxxxxxxxxxx. He referred Mr. A to the Employee Assistance Program. He alleged that his command "stonewalled" him on the matter.

6. The applicant submitted a copy of notes of a mid-period meeting between him and Mr. G, which he alleged that he received from Mr. G. In the notes, the applicant is described as having "excellent people skills," having done a good job communicating with his subordinates about goals and expectations, having prepared timely mid-term evaluations, and having avoided a serious conflict with the secretary "by stepping back for a couple of weeks and then counsel[ing] [her] on acceptable behavior." The notes also indicate that Mr. G raised several issues with the applicant, such as improving his working relationship with the union, cutting back on the number of his e-mails, and "think[ing] before responding."

7. Ms. C wrote in a statement for the applicant that she had worked for Mr. G since 1988 and filed a grievance against him in 1995. She alleged that the applicant's predecessor had gone along with Mr. G in favoring one inspector and being inconsiderate to the other and to herself. Ms. C stated that when the applicant first arrived, they worked well together, but Mr. G resented their good working relationship. She stated that Mr. G "never wanted anyone he was in charge of to like anyone outside [of] 'his boys'." She stated that the applicant was prevented from doing his job sometimes because of Mr. G's interference. She stated that Mr. G sometimes went to people behind the applicant's back and often overturned people's decisions.

8. In response to a January 2, 1999, email from the applicant recommending that a civilian employee serving as an xxxxxxxxxx be thanked for cutting short his holiday to make rapid emergency repairs in a xxxxxxxx, the Xxxxxx Xxxxxxxx agreed and extended his thanks to the applicant and the entire duty section for a "great job."

9. In a note to himself dated January 21, 1999, the applicant stated that after he had set up a meeting with a union representative and Ms. C, the union representative refused to continue the meeting or indicate the nature of the grievance because the applicant had invited a witness and did not have copies of personal notes to himself that he had made about Ms. C's conduct. The applicant stated that he was entitled to have a witness present at the meeting and that he did not bring his notes simply because he had not been asked to do so. Moreover, the legal office had told him that it would be unwise to provide Ms. C with written counseling because of an ongoing lawsuit she had brought against the government. An attached email message from the shop steward indicates that the union representative was to call the applicant to set up another meeting. However, the applicant's note indicates that instead of doing so, the union representative took the matter to the Xxxxxx Xxxxxxxx, and the ZZ came to the applicant accusing him of causing the delay in the resolution of the matter.

10. The applicant submitted a series of email messages beginning with one from Mr. A dated February 8, 1999, in which he complained that other people in the office were getting overtime work for special projects and he was not. Mr. A stated that "[t]his is how [Mr. G] creates hate and discontent in this office." The applicant apparently replied to him, stating that the chain of command always strove to ensure that all employees were treated fairly and objectively and offering to meet with him to discuss his concerns. The applicant emailed this exchange to the ZZ along with a note indicating that he had met with Mr. A and told him that the overtime was authorized to complete some xxxx work and that he could get further clarification from the ZZ or Mr. G. In response, the ZZ thanked the applicant for meeting with Mr. A.

11. The applicant submitted a note he made to himself in which he alleged that on March 12, 1999, he entered Mr. A's office and overheard the end of a conversation between Mr. A and Ms. C in which Mr. A stated, laughing, "That ought to shake him up!" When the applicant asked to whom he was referring, Mr. A refused to answer. When he returned to his office, the applicant found that Mr. A had just sent him an email message asking why the applicant would not sign a leave slip for Mr. A since he had been late to work that morning. Mr. A had sent copies of the email to the union president, the ZZ, the Xxxxx's attorney, and Ms. C. In the note, the applicant further observed that Mr. A had been reporting to work (a) late, (b) with the smell of alcohol on his breath, and (c) apparently "hung over" or incoherent with slurred speech, bloodshot eyes, and an inability to understand simple concepts. The applicant stated that he had mentioned these problems to the ZZ and was told that, because of Mr. A's lawsuits against the government, the applicant should wait until later to raise the issues with him. He also stated that the ZZ tried to "shoot the messenger" by discred-

iting his observations about Mr. A's behavior. In addition, the applicant noted to himself that Mr. A's gun-collecting hobby was a cause of concern to him.

12. In a memorandum dated May 14, 1999, the applicant told the ZZ and Mr. B that, now that the final grievance in the office had been resolved, he wanted to add several positive, substantive comments to his subordinates' evaluations. He stated that he had not provided comments before on the advice of the Xxxxx attorney and another officer. He stated that he and they had been afraid that any comment could have been used against him or the Coast Guard by the employees and their attorneys and union representatives. He stated that it was not out of laziness that he did not previously submit comments but out of concern for how they might be used.

13. In a note to himself dated May 26, 1999, the applicant summarized his counseling session with Mr. B concerning the latter's performance appraisal. Mr. B had told him that he felt he deserved a "meritorious" rating because of his xxxxxxxx xxxxs, his overtime work, and his being made project manager for several jobs. Mr. B told him that he believed the "proficient" rating showed that he was "being used as a pawn" because of Mr. A's suit against the command. The applicant wrote that he told Mr. B that because all of the xxxx work had been assigned to Mr. B by Mr. G and the applicant's requests to see the work had been denied, the applicant could not verify that any of Mr. B's xxxxs merited a "meritorious" rating. When Mr. B suggested that he work the issue out with Mr. G, the applicant stated that he had already asked to be involved to no avail, so he could not substantiate that Mr. B had performed xxxx work at a "meritorious" level. He stated that when he asked Mr. B for examples of his xxxx work, Mr. B refused and sounded disgusted.

The applicant further stated in this note that he did not consider working paid overtime to be a justification for a "meritorious" rating per se and that if Mr. B would show him his overtime xxxx work, the applicant would consider raising the rating. The applicant stated in the summary (though he indicated that he did not say this to Mr. B) that he believed that Mr. B had been assigned unnecessary paid overtime work by Mr. G as a form of bonus, while Mr. A had been denied overtime for legitimate requests, such as inspecting work performed by contractors at night. However, he wrote, since he "was kept out of the decision loop," he could be mistaken.

Regarding Mr. B's work as project manager, the applicant stated that he told Mr. B that he would have to provide more specifics about his work before raising his rating. However, Mr. B again said that he did not want to do more paperwork.

- The evaluation period for the disputed OER ended on May 28, 1999. Mr. G completed his part of the draft OER on June 3, 1999. •••

14. In a note to himself dated June 15, 1999, the applicant stated that Mr. G became extremely angry because the new ZZ sent an email informing not only his

direct subordinates, but also his subordinates' subordinates, such as the applicant, that another officer would be in charge for a week while the new ZZ was away.

15. In an email message dated June 17, 1999, Mr. A complained that a rumor was circulating that he had made disparaging remarks about an xxxxxxxxx xxxxxxxxxx and that he had suggested someone throw water on a xxxxxxxxxx to test it. He also complained that the ZZ had sent Mr. B to assess Mr. A's project. The applicant wrote a note to himself stating that he had investigated the matter after Mr. G indicated that he had heard the rumors and asked him to handle it. The applicant stated that no contractor admitted to having heard Mr. A make disparaging remarks and that the contractors stated that the comment about throwing water on the xxxxx had been an obvious joke.

16. In a note to himself dated June 18, 1999, the applicant stated that Mr. G entered his office and asked for the xxxxx for a project that the applicant was managing. Mr. G told him that he was meeting someone about the project. When the applicant asked why he was not invited to the meeting, Mr. G began swearing at him.

17. An email message that the applicant sent to the new ZZ on June 24, 1999, relates an incident in which Mr. G "stormed into" his office and asked the applicant to meet him in the conference room at ten o'clock. When the applicant told Mr. G that he was doing urgent work for the new ZZ, Mr. G asked him if he was refusing to meet with him and, when the applicant denied it, told the applicant to be in the conference room at ten o'clock and that Mr. G would arrange things with the new ZZ. The applicant stated that he felt Mr. G was trying to intimidate and demean him.

18. An email message from the applicant to the new ZZ dated July 8, 1999, refers to the disputed OER signed by the previous ZZ and states that he was never counseled by Mr. G about the content of the OER. In response, the new ZZ stated that he thought the applicant was doing "a fine job."

19. In an email message to the new ZZ dated July 19, 1999, the applicant stated that Mr. G had reacted very strongly and negatively to the applicant's decision to notify the Xxxxxxxx Section about the removal of a xxxxxxxxxx. In his response, the new ZZ indicated that he thought that the applicant had used "common sense" and that he should "keep[] using [his] good judgment" in dealing with such issues.

20. LCDR W stated in a letter dated December 15, 1999, that he worked closely with the applicant as a project manager during the evaluation period. He stated that the applicant had confided in him about some of the problems he was experiencing in the Xxxxxxxx Branch. LCDR W stated that he himself felt a "tremendous amount of tension" in the office when he visited, apparently because of Mr. A's grievance. LCDR W stated that the grievance concerned, in part, Mr. G's alleged habit of assigning the best work to Mr. B and the worst work to Mr. A. He stated that the applicant told him he was trying to assign the work evenly and fairly but felt "trapped between" Mr. G

and Mr. A. LCDR W further stated that the applicant was “very personable and professional” and that he displayed good judgment as an xxxxxx.

21. The applicant submitted excerpts from a February 29, 2000, decision in a lawsuit brought by a former employee of the office. He alleged that although the lawsuit concerns incidents that occurred in the mid 1990s, prior to his arrival at the Xxxxx, and although he never met most of the witnesses named in the case, the “common thread” between the events described in the decision and his case is the “abusive, vindictive and retaliatory actions” by Mr. G.

In the decision, the Administrative Review Board (ARB) of the U.S. Department of Labor found that the Coast Guard had created a “hostile work environment” for the plaintiff, who had been an xxxxxxxx xxxxxx in the Xxxxx’s xxxxxxx Division under Mr. G’s supervision. The ARB found that Mr. G had harassed the plaintiff for attempting to bring the Xxxxx into compliance with federal, state, and Coast Guard laws and policies concerning hazardous waste. The ARB found that Mr. G had “engaged in tirades, threatened [the plaintiff] with a lawsuit, and removed many of [his] xxxxxxxx duties or diminished his position” and that his actions had caused the plaintiff “great stress and anxiety.” The ARB noted that Mr. G had reacted similarly when the previous xxxxxxx xxxxxx at the Xxxxx reported a xxxxxxxx xxxxxxxx problem to the State’s regulatory agency. The ARB stated that it was clear from the record that Mr. G had revised the plaintiff’s duties because of his efforts to obtain xxxxxxxx compliance. The ARB found that because the chain of command had not reacted properly when the plaintiff complained about Mr. G’s harassment, the Xxxxx was liable as *respondeat superior*.

22. In addition, the applicant submitted several email messages from other officers thanking him for completing various tasks; email messages from xxxxxxx praising him and thanking him for serving as their academic advisor; notes to himself about Mr. G’s behavior from October 1999 to February 2000; and emails mentioning incidents in which he had praised or critiqued his subordinates’ work appropriately; and notes to himself. The applicant also submitted four letters of reference from Coast Guard officers, including two who worked with him at the Xxxxx:

23. The Chief of xxxxxx xxxxxx at the Xxxxx stated that the applicant had an extraordinarily large workload but displayed great stamina in managing it. He praised several aspects of the applicant’s work.

24. The Chief of the xxxxxxxx Section at the Xxxxx stated that he had always found the applicant to be professional in his dealings at work and to maintain a positive attitude. He stated that the applicant had an “ability to focus on the essential elements of a problem, develop a course of action, and implement the solution.”

VIEWS OF THE COAST GUARD

On May 24, 2002, the Chief Counsel of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant partial relief in this case by raising the applicant's mark for "Evaluations" from 3 to 4 and redacting the two negative comments that support the mark of 3: "Submission of civilian evaluations were [sic] not timely and had inaccurate/insufficient comments. Evaluation narratives were of poor quality and required substantive revisions by supervisor before submission." However, the Chief Counsel recommended that no other relief be granted.

The Chief Counsel based his recommendation on a memorandum prepared by CGPC. Attached to the memorandum were affidavits by Mr. G and the ZZ, the supervisor and reporting officer for the disputed OER, and notes they made regarding the low marks when preparing the OER.

Affidavit and Notes of Mr. G (the Supervisor)

In supporting the mark of 3 for "Evaluations," Mr. G repeated the comments that appear in block 5 of the disputed OER. In addition, he stated that the applicant's civilian evaluations "did not reflect actual performance." He stated that

3. ... [t]he 1st draft of the evaluations for the inspectors rated them both the same even though their performances were different; the 2nd submittal provided no write-up on their performance and rated them both equal even though their performance was different; refused to provide a valid evaluation/written comments on the two employees. [The applicant] was given an opportunity to correct the evaluations and flat refused!

4. The revised OER (additional information was provided to substantiate the marks) was routed through the chain of command. The discrepancy between the date of the rejected OER and the final OER was simply due to a wrong date being carried over from the draft that I had provided [the ZZ] on 5/19/99.

5. [The applicant] was rated a 3 in block 8b (Judgment) for his dealings with personnel both at the Xxxxx and outside personnel. He was counseled multiple times on his tone/comments in e-mails and at one time was prohibited from sending e-mails outside of the immediate office; his actions with Xxxxx personnel required me to counsel him on his attitude and treatment of people and required my personal involvement to resolve both grievances and union complaints; correspondence to contracting staff was at times unprofessional and extremely antagonistic and unprofessional [sic]. Used poor judgment in dealing with peers and supervisors.

The notes Mr. G made about the mark of 3 in "Evaluations" appear as follows:

- [The applicant] supervised three civilian employees and was required to submit complete evaluations to supervisor in time for review and processing by supervisor so that they would be in Civilian Personnel [no later than] Friday 23 April 1999.

- [He] delivered the evaluations on his employee's [sic] late Friday afternoon. The ratings were not documented by specific examples and were general. [He] was on leave the following week and not available for rewrite (he boxed me in because of the last minute submission of the evaluations and he left me no time for review). When I discussed the evaluations [with him] and asked him to provide specifics for the ratings, he was unable to document high or low performance. He used general number [sic] for both [Mr. B and Mr. A] that had no basis in reality. When questions [sic] on the ratings for [them], he said he rated them the same to avoid a grievance. Ratings for [Ms. C] were based on his poor interaction with her the last couple of months (a grievance was filed by her) and did not take into account her excellent performance for the majority of the marking period.
- The next submission of the ratings for his folks showed them all as proficient with no comments.
- I had to personally place comments on all three evaluations of his folks.
- [He] was rated as a three in this block for the following reasons:
 - * Narratives were inaccurate and of poor quality
 - * Failed to uphold service performance standards by assigning marks based on performance
 - * Reports required revision by supervisor and were not timely

Affidavit and Notes of the ZZ (the Reporting Officer)

The ZZ stated that he prepared his part of the OER, including the mark of 3 for "Judgment" and supporting comments, and forwarded it to the reviewer in early July 1999. After the reviewer signed and submitted the OER to CGPC, it was returned with a letter on August 23, 1999, for additional work. The ZZ stated that he received a revised copy of the OER and CGPC's letter in a fax from Mr. G on September 16, 1999. He reviewed the new OER and found Mr. G's changes to be consistent with his own recollection of the circumstances. On September 20, 1999, he received another fax from Mr. G with his final version of the supervisor's section of the OER. The ZZ stated that he concurred with it and, on September 21, 1999, edited his own comments in the OER to support the mark of 3 he had assigned for "Judgment." He forwarded the final version of the OER to the reviewer, who signed it on October 5, 1999. Regarding the mark of 3 for "Judgment," the ZZ stated that the applicant

did not always keep the chain of command informed on his proposed actions, including consultation with legal staff and civilian personnel advisor. [This was considered important due to a sensitive personnel issue concerning one of [the applicant's] subordinates.] On more than one occasion, [his] interaction with others showed poor judgment, in that his reaction or method of interaction proved problematic (his involvement did not resolve a situation but sometimes made it more difficult). His dealings with the contracting staff ..., union officials ..., and his subordinates are examples. [He] was counseled on using good judgment in communicating with others; his method of using impersonal means (e-mail) appeared ineffective at times and led to misunderstandings. He was also advised to be very thorough in understanding and researching Commandant directives and guidance on issues pertaining to civilian personnel; he often seemed to be acting in contradictory manner to advice issued by civilian personnel liaison In conclusion,

there were a number of situations where [he] did not demonstrate the common sense and sound decision-making that is expected of a senior [LT].

The notes the ZZ made about the mark of 3 in "Judgment" appear as follows:

[The applicant] was directed numerous times to inform the chain of command, including legal and civilian personnel on any proposed actions which were of a sensitive nature; he did not always do this.

[He] had difficulty at times in knowing what actions (or lack of action) was appropriate based on the circumstances; specifically he would react in an e-mail in a manner which often exacerbated a situation rather than resolve it—dealing with ... contracting staff, union officials, subordinates, etc.

[He] had a habit of sending e-mails rather than speaking to an individual face to face or even on the phone, which in many cases may have prevented misunderstandings or miscommunication.

[He] was reminded on numerous occasions to be thorough in researching the background references (COMDTINST's, etc) to make sure he firmly established the applicable guidelines or directives which applied to particular situations. It was not always apparent the he had done so.

In summary, [he] did not always demonstrate the common sense, experience, and sound decision-making that would be expected of a senior [LT].

Memorandum of the Coast Guard Personnel Command

CGPC stated that the record indicates that the applicant's proper rating chain, including Mr. G, the ZZ, and the appointed reviewer, completed the disputed OER and forwarded it to CGPC in August 1999. CGPC stated that the Xxxxxxxx of the Xxxxx properly designated reviewer duties to someone other than the ZZ's supervisor. When CGPC returned the OER because of inconsistencies between the marks and comments, the rating chain "had the latitude to address the disparity in whichever manner they deemed appropriate. In this case the Rating Chain amended the narrative to support the 'below-standard' mark of '3.'" CGPC indicated that the rating chain could have chosen to raise the marks to match the narrative but apparently "deemed the numerical mark to accurately reflect his performance, and as required, provided documentation in the re-submitted report."

CGPC stated that, although the dates of two of the signatures on the disputed OER reflect the dates of earlier drafts of the OER and not the dates Mr. G and the ZZ actually signed the final version, the reviewer's hand-written signature and the affidavits of Mr. G and the ZZ prove that the disputed OER in the applicant's record is the final version that was reviewed, revised, and endorsed by the rating chain after CGPC returned their original submission because of the inconsistencies. CGPC pointed out that the ZZ concurred in the mark of 3 for "Evaluations" on the original OER and concurred in Mr. G's comments supporting the mark of 3 in the final version of the OER.

CGPC stated that the inaccurate dates beside the signatures on the disputed OER are “administrative discrepancies [that] do not detract from the overall OER and are not a basis to change marks or withdraw this OER from the service record.”

With respect to the mark of 3 for “Evaluations,” however, CGPC stated that Mr. G’s statements and the applicant’s evidence indicate that the applicant’s “attempt to draft and submit accurate evaluations on his subordinates was stymied.” CGPC stated that, under the regulations for civilian performance evaluations, Mr. G should have discussed any disagreement he had about the evaluations with the applicant and could himself have made any changes he wanted to them as long as he documented the reasons for the changes. CGPC further stated that Mr. G could properly have returned the evaluations to the applicant and asked him to improve the quality of the narratives, but it was not proper for Mr. G to return them with a direction to change the ratings to certain levels. CGPC stated that Mr. G, “if he was not satisfied with the evaluations, should have accepted the evaluations as submitted, changed the rating, and documented the performance-based reason for the change.”

Regarding the timeliness of the civilian evaluations, CGPC stated that the record indicates that the applicant submitted them on April 16, 1999, just before going on leave and one week before April 23, 1999, when the supervisor wanted to submit them to the Civilian Personnel office. Moreover, they were completed “well within the 60-day period” following the end of the evaluation period. CGPC stated that if Mr. G was unsatisfied with the evaluations and wanted them completed within a “self-imposed three-week deadline,” he could have suspended the applicant’s leave instead of waiting for him to return to discuss them.

In light of these facts, CGPC recommended that the Board raise the applicant’s mark for “Evaluations” to a 4 and remove the negative comments that were added to support the mark of 3.

Regarding the mark of 3 for “Judgment,” CGPC alleged that the ZZ’s declaration and notes on the OER fully support the low mark. CGPC also argued that the ZZ’s declaration and notes prove that the applicant was counseled on numerous occasions to use better judgment in his communications and to be more thorough in his work. CGPC pointed out that the notes on mid-term counseling submitted by the applicant include some criticisms about the applicant’s e-mail communications. Therefore, CGPC argued, the applicant is wrong to claim that he was given “no warning and no fair opportunity to correct” his performance. CGPC recommended against raising the mark for “Judgment” or removing the supporting comments.

CGPC stated that the workplace climate depicted by the applicant “was tense but not hostile where the Applicant could not bring issues forward for fear of retaliation.” CGPC pointed out that the applicant sent a memorandum to the ZZ on the office climate in October 1998 and, in response to other such correspondence, was advised by

the ZZ to consult with the Civilian Personnel office. CGPC also pointed out that the applicant frequently consulted Coast Guard Legal Officers about sensitive personnel matters, but submitted no evidence to indicate that he had ever addressed any concerns for himself with them or expressed to them his alleged fear of retaliation by Mr. G. Moreover, CGPC pointed out, most of the evidence that the applicant submitted about Mr. G is dated after the end of the evaluation period for the disputed OER. CGPC concluded that the applicant "did not provide convincing evidence that he worked in a hostile environment and could not bring issues forward for fear of retaliation."

With respect to the applicant's failures of selection for promotion to LCDR, CGPC stated that, although the applicant has a good record, he "lacked promotion recommendations to the grade of LCDR beginning with the June 1997 evaluation period through his failed promotion cycles in 2000 and 2001. The stated opportunity of selection for the 2000 LCDR Reserve Selection Board was 65% and 2001 LCDR Reserve Selection Board was 70%. ... Lacking promotion recommendations that would validate that the member could serve the [Coast Guard] well at the next higher grade or recommendations for increased responsibility at the current grade held, could be interpreted by selection boards as an indicator that he could not serve the [Coast Guard] well in positions of greater rank." CGPC stated that, while the applicant's recent OERs show "technical competence," they do not show "leadership growth within his specialty. As officers get more senior, they are expected to progress from technical competence to demonstrating leadership." Therefore, CGPC concluded that, although the changes the applicant is seeking on the disputed OER would improve his record, "there is no nexus between [his] requested relief and his non-selection to LCDR, as his career progression has not shown the growth required for promotion."

Advisory Opinion of the Chief Counsel of the Coast Guard

The Chief Counsel "fully concur[red] in CGPC's analysis of the case. The Chief Counsel stated that the applicant has proved that Mr. G failed to follow established procedures with respect to the civilian evaluations. However, he argued, the record does not support the applicant's allegations with respect to his mark of 3 in "Judgment" and the supporting comments.

The Chief Counsel argued that Board should apply the following standards in deciding whether to grant relief:

To establish that an OER is erroneous or unjust, the applicant must show a misstatement of hard fact or a clear violation of a statute or regulations. Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992); CGBCMR Dkt No. 86-96. In determining whether Applicant has met this burden, Applicant's rating officials are strongly presumed to have acted correctly, lawfully, and in good faith in executing their duties. Arens v. United States, 969 F.2d 1034, 1037 (1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel argued that the applicant has failed to rebut the presumption of regularity with respect to his mark for "Judgment" and the supporting comments.

The Chief Counsel further argued that the applicant failed to establish the "substantial connection or nexus" between the disputed OER and his failures of selection. He alleged that, while the mark of 3 in "Evaluations" and the supporting comments arguably made the applicant's record appear worse than it would have otherwise, it is unlikely that the applicant would have been selected for promotion in any event.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 3, 2002, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond. The Coast Guard did not initially provide copies of the declarations of Mr. G and the ZZ. On August 16, 2002, these were received by the BCMR and forwarded to the applicant with another invitation to respond.

In response to the views of the Coast Guard, the applicant stated that Mr. G and the ZZ had lied in characterizing his work during the marking period. He alleged that he never refused an order to add comments to the evaluations. He alleged that the mark of 3 for "Judgment" was based solely on his preparation of the civilian evaluations and so should be corrected along with the mark and comments he received for "Evaluations."

The applicant stated that the Coast Guard's allegation that he did not make his command or the Legal Office aware of his hostile work environment during the evaluation period is "preposterous and beyond laughable." He alleged that he made the ZZ and the Xxxx's attorney aware of numerous threats and hostile and demeaning remarks by Mr. G during the period. Moreover, he alleged that in response to his complaints, the Legal Office forbade him from speaking to Mr. A's attorney. He alleged that his low marks resulted from the command's dislike of his assessment of the performance of his subordinates and of the workplace environment. He asked the Board to raise his marks for "Evaluations" and "Judgment" to 5s.

On October 23, 2002, the applicant contacted the Board again, requesting to appear at a hearing and indicating that he might submit more evidence. The Chair told him that because the Board might not grant him a hearing, he should submit copies of all relevant evidence. In November 2002, the applicant called requested and received a complete copy of the contents of his case file. He stated that he might submit more evidence. On January 5, 2003, the applicant wrote to inform the Chair that the Board should not consider his case "ready for decision" until he had an opportunity to receive feedback from the Board on his application and to respond to any questions the Board might have. He stated that he could provide more documentation and information but wanted feedback from the Board on his application before he would do so. On January 7, 2003, the Chair replied, informing the applicant that the Board does not provide feed-

back about applications and encouraging him to submit any further evidence he might have promptly to prevent any further delay in his case being ready for decision.

On February 3, 2003, the applicant sent the Board his "Closing Statement." In it, he repeated his allegation that he had received no prior warning of the low marks and had had no opportunity to correct his rating chain's misperception, to "present [his] case to [his] chain of command," or to comment on the marks. He alleged that the marks were assigned by Mr. G and the ZZ "wrongfully and maliciously." He alleged that they assigned the low marks because he would not lie for them about "their weak, ineffective and abusive ... leadership and management styles." He alleged that he "became their easiest target of opportunity in May of 1999 ... just before we were all scheduled to be deposed and interviewed [for Mr. A's lawsuit] ... and coincidentally the time that my first OER from the Xxxxx was due." He stated that although he tried to engage the attention of the ZZ's superiors, no one saw the conflict of interest inherent in his being evaluated by officers he was having to testify against. He alleged that his career suffered because he told the truth—that Mr. G and the ZZ "were so blinded by their dislike and distrust" of Mr. A that they could not be convinced that Mr. A was still performing his job in an acceptable manner—and it reflected poorly on both Mr. G and the ZZ. He stated that Mr. G and the ZZ probably "caught wind" of his testimony from the Xxxxx's attorney at the same time they were preparing his OER. He alleged that they must have learned something about what his testimony would be because the attorney would have questioned them to try to find ways to discredit his damaging observations. He alleged that they assigned him the marks of 3 to "save face" and as a preemptive strike to discredit his testimony. Although he never actually had to testify because the case was settled out of court, he alleged that Mr. G and the ZZ already knew from the attorney about what he would have said and were angry. He alleged that if he had testified, the Coast Guard would likely have used the low marks in the disputed OER to discredit his testimony on the stand.

The applicant alleged that Mr. G had a "reputation for having numerous formal and informal complaints that centered on such subjects as harassment, manipulation of performance evaluations, hostile and degrading treatment of subordinates, stalking of [Xxxxx] employees, throwing a telephone across an office nearly striking an office secretary, slashing tires and keying a personal vehicle after hours, threatening to 'execute' and 'kill' individual [Xxxxx] employees, etc. These traits were well known and ignored by the Coast Guard or dismissed as not serious." He alleged that the Coast Guard's typical response was to "circle the wagons and deny everything." He stated that by placing him in between Mr. G and Mr. A and failing to provide "support, integrity, and guidance from the top," the Coast Guard let him "twist in the wind."

The applicant repeated his allegation that the only time the ZZ had indicated to him that his judgment was in question was when he asked the applicant about his decision not to include comments on the civilian evaluations. The applicant argued that, in light of the pending lawsuit and complaints, he showed "exceptional" judgment in

including no comments in the evaluations. He alleged that including no comments "was within [his] supervisory right and not subject to question by [the ZZ]." Moreover, he alleged that the ZZ never said a single word to him about the low mark for "Judgment" before he was transferred to Miami in June 1999.

The applicant stated that the ZZ's declaration is misleading in suggesting that his relationship with the union representative and Ms. C was difficult or reflective of any poor judgment on his part. He alleged that there were initially some misunderstandings caused by the pre-existent tense atmosphere in the office, but that all such problems were resolved after a few days and the three of them developed a professional working relationship. He alleged that the ZZ must have been given misinformation about this matter by Mr. G, "a proven and documented liar."

The applicant alleged that if the first draft of the OER was truthful, CGPC should not have given his rating chain the opportunity "to doctor, fabricate and manipulate those remarks to assist them in creating fictional marks of three that were wrongly assigned in the first place."

Finally, the applicant alleged that it was absurd for the Coast Guard to allow two selection boards to review his record after he had already quit the Service "in disgust." Therefore, he asked the Board to remove those failures of selection as well as raise the low marks. He stated that he is now a captain in the Air National Guard and that the negative evaluations in his Coast Guard record would hamper his promotion to major.

APPLICABLE REGULATIONS

Composition of the Rating Chain

Articles 10.A.2.d.1., e.1., and f.1. of the Personnel Manual provide that each OER is prepared by the reported-on officer's "rating chain" of three senior officers: the supervisor (usually the officer to whom the reported-on officer answers on a daily basis), the reporting officer (usually the supervisor's supervisor), and the reviewer (usually the reporting officer's supervisor). The reviewer's function is primarily administrative, and there is no requirement that he or she have occasion to closely observe the reported-on officer's performance.

Article 10.A.2.g.1. of the Personnel Manual provides that an officer may be "disqualified" from serving on a subordinate's rating chain. Article 10.A.2.g.2.b. provides that the term "'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 raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation." Article 10.A.2.g.2.c. provides that "[i]f not already determined by the commanding officer, it is incumbent on the Report-

ed-on Officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised as soon as practicable prior to the completion of the reporting period."

Responsibilities of the Rating Chain

Article 10.A.1.b.(1) of the Personnel Manual provides that "[e]ach commanding officer must ensure that accurate, fair, and objective evaluations are provided to all officers under their command."

Article 10.A.1.b.(2) states that "[t]here is only one person responsible for managing the performance of an individual officer and that is the officer himself or herself. He or she is ultimately responsible for finding out what is expected on the job, for obtaining sufficient feedback or counseling, and for using that information in adjusting as necessary to meet or exceed standards."

Article 10.A.1.c.(9) states that "no specific form or forum is prescribed for performance feedback. It may be formal or informal. Performance feedback (or counseling) actually occurs whenever a subordinate receives from a rating officer any advice or observation related to the subordinate's performance or any other matter on which he or she may be evaluated. Performance feedback can occur in a conference, during a consultation or counseling session, or through on-the-spot comments about performance, or when the evaluation is returned. Each officer must be continuously alert for the "signals" received in one of these ways from seniors. If the signals are not clear (or understood), the officer should seek clarification or expansion on his or her own volition." Article 10.A.2.c. provides that it is the responsibility of the reported-on officer to seek performance feedback, "as necessary," from the supervisor. It also provides that the reported-on officer "[a]ssumes ultimate responsibility for managing own performance, notwithstanding the responsibilities assigned to others in the rating chain. This includes ensuring performance feedback is thorough"

Article 10.A.2.d.(2) provides that it is the supervisor's responsibility to "[p]rovide[] performance feedback to the Reported-on Officer upon that officer's request during the period or at such other times as the Supervisor deems appropriate." Under Article 10.A.2.e.(2)(h), the reporting officer should also provide performance feedback "as appropriate."

Article 10.A.2.c.2. provides that an officer should initiate his own OER by submitting input to the supervisor at least 21 days before the end of the evaluation period.

Instructions for Preparing an OER

Article 10.A.4.d.4. instructs supervisors to assign marks and write comments for the first 16 performance categories on an OER, including "Evaluations," as follows (vir-

tually identical instructions are provided in Article 10.A.4.d.7. for reporting officers, who complete the rest of the OER, including the mark for “Judgment”):

(b) For each evaluation area, the Supervisor shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Supervisor shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. The Supervisor shall take care to compare the officer's performance and qualities against the standards--NOT to other officers and not to the same officer in a previous reporting period. After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Supervisor fills in the appropriate circle on the form in ink.

• • •

(d) In the "Comments" sections following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a "4." (Comments are required for Work-Life Sensitivity/Expertise, Operational/Specialty Expertise and Collateral Duty/Administrative Expertise regardless of mark assigned.) The Supervisor shall draw on his/her own observations, from those of any secondary supervisors, and from other information accumulated during the reporting period.

(e) Comments should amplify and be consistent with the numerical evaluations in the evaluation area. They should identify specific strengths and weaknesses in performance. Well-written comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition of the phrases used in the standards is not sufficient narrative justification for marks.

Article 10.A.4.d.(9)(a) instructs the reporting officer to complete the Comparison Scale on an OER by “fill[ing] in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.”

Article 10.A.2.e.2.e. provides that the reporting officer shall forward an OER to the reviewer within 30 days of the end of the reporting period.

OER Review

Article 10.A.2.f.2.c. provides that, after the supervisor and reporting officer have completed an OER, the reviewer “[e]nsures that the Supervisor and Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omission, or inconsistencies between the numerical evaluation and written comments.” Article 10.A.2.f.2.e. provides that the reviewer shall forward the OER to CGPC within 45 days of the end of the reporting period.

Article 10.A.2.h. provides that, when an OER is received by CGPC, it undergoes a “thorough quality review.” Article 10.A.4.j. provides that in CGPC’s review of an OER, “[p]articular attention is given to inconsistencies between the numerical evaluations and written comments. The review is not intended to question a rating official’s judgment about a subordinate’s performance, but to ensure OERs have been prepared in accordance with OES guidelines.” The rating chain is supposed to complete any required revision of an OER and return it to CGPC within 30 days.

Replies to OERs

Article 10.A.4.g. allows the Reported-on Officer to file a reply to any OER within 14 days of receiving it to “express a view of performance which may differ from that of a rating official.” The reply is forwarded up the rating chain so that each member has a chance to respond to the Reported-on Officer’s statements. The reply and any responses by rating chain members are filed in the officer’s record with the OER.

Civilian Evaluations

Under the Performance Management System of the Department of Transportation, civilian performance evaluations must be completed within 60 days of the end of the evaluation period. Performance ratings are assigned by the employee’s immediate supervisor. If the second-level supervisor disagrees with a rating, he or she should discuss it with the immediate supervisor. The second-level supervisor may change any rating assigned by the supervisor but must document the reason for the change. Explanations are only required for ratings above or below the “proficient” level.

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. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. Absent specific evidence to the contrary, the Board presumes that an applicant’s rating officials acted correctly, lawfully, and in good faith in making their evaluations.⁵ Once an applicant has rebutted the presumption of regularity by present-

⁵ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

ing at least some evidence that “specifically and convincingly contradicts his rating officials’ marks and comments,”⁶ the Board weighs the evidence in the record to determine whether the applicant has met his burden of proof—the preponderance of the evidence—with respect to the challenged OER.⁷ The Board determines whether the applicant has proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁸ With this standard in mind, the Board has carefully considered all of the evidence regarding the disputed OER and draws the following conclusions with respect to the evidence.

4. The applicant challenged the validity of the disputed OER based in part on the dates of the signatures. The final version of the OER that was approved by CGPC anomalously indicates that Mr. G signed it on May 19, 1999—that is, before he signed the version of the OER that the applicant saw in July 1999—and that the ZZ signed it on June 30, 1999, which is the same day he signed the other version. However, the Board is not persuaded that the dates prove some mix-up between the draft and final OERs. The draft OER that the applicant was given in July 1999 contains no comments supporting the low marks and so is clearly the one that was rejected by CGPC for inconsistency. The OER that CGPC approved in October 1999 was signed and dated by the reviewer just a few days before. Moreover, the declarations of Mr. G and the ZZ indicate that they both remember revising and adding the disputed comments to the OER that was finally accepted by CGPC on October 13, 1999.

5. The applicant alleged that CGPC erred in giving his rating chain an opportunity to add negative comments to his OER. However, under Articles 10.A.2.h. and 10.A.4.j. of the Personnel Manual, CGPC must return an OER for revision if it contains an inconsistency between the marks and the corresponding comments. The draft OER clearly contained such inconsistencies since the marks of 3 were unsupported by any critical comment about the applicant’s judgment and preparation of evaluations. Moreover, CGPC did not direct the rating chain to fix the OER in any particular way other than to make it more consistent. The rating chain was free to do so either by supporting the chosen marks with consistent comments or by raising the marks to match the comments. Under Articles 10.A.4.d.4. and 10.A.4.d.7 of the Personnel Manual, rating chain officials are supposed to pick the numerical marks first and then add comments that support them. The applicant has not proved that CGPC erred in requiring the revision of the OER or that his rating chain erred in how it chose to make the marks and comments consistent.

⁶ Final Decision, BCMR Docket No. 2000-194.

⁷ 33 C.F.R. § 52.24(b). In determining the preponderance of the evidence, the Board continues to consider the evidentiary weight of the rating chain’s assessment even though the presumption of regularity has been rebutted. See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.10 (1981).

⁸ *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

6. The applicant challenged the validity of the disputed OER based in part on delays by his rating chain. Although the ZZ missed meeting the 30-day deadline, under Article 10.A.2.e.2.e. of the Personnel Manual, for submitting the draft OER to the reviewer by a couple of days and the reviewer missed the 45-day deadline under Article 10.A.2.f.2.c. for submitting the draft OER to CGPC by a couple of days, the applicant has not proved that he was harmed in any way by these delays. A small, harmless procedural error is insufficient to justify invalidating an otherwise valid OER. Moreover, the record indicates that the applicant himself failed to meet his deadline of providing his input for the OER at least 21 days before the end of the reporting period. The OER shows that he submitted his input on May 11, 1999; the normal evaluation period for lieutenants ended on May 31, 1999; and because his reporting officer, the ZZ, was leaving, the applicant's own evaluation period for the disputed OER ended on May 28, 1999. Similarly, the applicant has failed to prove that he was harmed by the fact that his rating chain took more than the 30 days provided under Article 10.A.4.j. to revise and resubmit the OER to CGPC. Therefore, the Board concludes that the small delays in submissions by the rating chain did not constitute prejudicial violations of regulation.

7. The applicant challenged the validity of the disputed OER based on the fact that the reviewer, CDR I, was not the supervisor of the ZZ and had little occasion to observe his work. However, according to CGPC, CDR I had been properly designated as the reviewer on the applicant's rating chain by the XXXXXXXXX of the XXXXX. While reviewers are often the supervisors of reporting officers, the Personnel Manual does not require that the reviewer be the reporting officer's supervisor or even that the reviewer have much occasion to observe the reported-on officer's performance. Under Article 10.A.2.f.2. of the Personnel Manual, unless a reporting officer is a civilian (which is not the case here, since the ZZ was a CDR), the reviewer merely reviews the OER for consistency and for compliance with the rules of the Officer Evaluation System.

8. The applicant alleged that he should never have been placed between Mr. G, an officer who was a defendant in a lawsuit, and Mr. A, the plaintiff in the lawsuit. The record indicates that he asked to be removed from this awkward position in October 1998, three months after starting the job. Under Article 10.A.2.g.2., an officer may be disqualified from serving on a rating chain if the officer is "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 as to whether the Reported-on Officer will receive a fair, accurate evaluation." Article 10.A.2.g.2.c. provides that a reported-on officer should report a potentially disqualified member of his rating chain to the next senior officer as soon as practicable. The applicant was not a party to the lawsuit, which arose before his arrival at the office. Although the applicant's position between Mr. G and Mr. A was undeniably awkward, he has submitted no evidence to corroborate his allegation that Mr. G and the ZZ were particularly biased against him during the evaluation period because of the lawsuit. Neither Ms. C nor LCDR W, whose statements on behalf of the applicant mention problems in the office, indicated that Mr. G or the ZZ was particularly biased against

the applicant or that they viewed the applicant as being an ally of Mr. A in the lawsuit. Ms. C stated that Mr. G resented her and the applicant's good working relationship and that Mr. G sometimes "interfered" with the applicant's work, but she was not in a position to determine whether Mr. G's actions were professionally necessary and appropriate. The Board finds that the applicant has failed to prove by a preponderance of the evidence that his subordinate's lawsuit against his rating chain created a "substantial question as to whether [he would] receive a fair, accurate evaluation." Therefore, the Board finds that the applicant has not proved that any member of his rating chain should have been disqualified under Article 10.A.2.g.2. of the Personnel Manual.

9. The applicant alleged that neither Mr. G nor the ZZ ever told him he might receive a mark of 3 on his OER. The Personnel Manual does not require officers to warn subordinates about any particular numerical mark they are considering assigning. Articles 10.A.2.d.(2) and 10.A.2.e.(2)(h) of the Personnel Manual do require rating chain members to provide appropriate feedback to officers on their performance, but under Article 10.A.1.c.(9), such feedback may be "formal or informal" and it is deemed to have occurred "whenever a subordinate receives from a rating officer any advice or observation related to the subordinate's performance or any other matter on which he or she may be evaluated." The record indicates that the applicant received mid-term counseling from Mr. G that included both praise and constructive criticism of his performance. In addition, the applicant's submissions indicate that Mr. G occasionally reversed his decisions and that the applicant, at least, was aware that he and Mr. G disagreed on several matters. Articles 10.A.1.b.(2) and 10.A.1.c.(9), and 10.A.2.c. of the Personnel Manual place the primary burden for ensuring performance feedback on the reported-on officer. The Board finds that the applicant has failed to overcome the presumption of regularity or to prove by a preponderance of the evidence that his rating chain committed any error or injustice in providing feedback to him about his performance.

10. The mark of 3 for "Evaluations" in the disputed OER is supported by the following comments: "Submission of civilian evaluations were [sic] not timely and had inaccurate/insufficient comments. Evaluation narratives were of poor quality and required substantive revisions by supervisor before submission." The record indicates that the applicant first submitted his civilian evaluations to his supervisor, Mr. G, on Friday, April 16, 1999. According to CGPC, this date was one week before Mr. G's "self-imposed" deadline of submitting them to the Civilian Personnel office by Friday, April 23, 1999, and well within the 60-day period after March 31, 1999, in which they had to be completed and submitted in accordance with the Performance Management System for civilian personnel. Mr. G thereafter reviewed the evaluations and, when the applicant returned from a week's leave on Monday, April 26th, directed him to submit revised versions within a couple of hours, which he did.

11. The record indicates that on April 16, 1999, the applicant submitted evaluations in which he assigned both Mr. A and Mr. B, "meritorious" ratings and Ms.

C a “needs improvement” rating and supported the ratings with comments. He alleged that he gave Ms. C the low rating because, due to Mr. G’s interference, he mistakenly thought she had been ignoring work he had assigned her. He alleged that he gave Mr. A the “meritorious” rating because he thought that Mr. A’s work was comparable to Mr. B’s, and Mr. G had “strongly suggested” that he rate Mr. B as “meritorious.” According to Mr. G’s declaration, however, the applicant told him that he gave Mr. A the same rating as Mr. B just to avoid a grievance. Mr. G also stated that the poor rating for Ms. C was based on just a few recent weeks of poor interactions, rather than on her “excellent performance for the majority of the marking period.” Mr. G’s declaration and notes support his comments in the OER about the inaccuracy of these evaluations.

12. Given a couple of hours to revise the evaluations, the applicant decided to rate all three employees as “proficient” and provide no comments, as allowed by the regulations. He alleged that he consulted the Xxxxx’s attorney, LCDR Y, and the ZZ’s second in command, CDR S. According to the applicant, LCDR Y told him that it would probably be best for the Xxxxx if the evaluations contained no comments, and CDR S questioned the wisdom of not including comments. Therefore, the applicant said, he proceeded with his plan, “against [his] better judgment,” because of the “cloud of a federal lawsuit” and because he feared how his employees might use any comments against him. The applicant admitted that at a meeting with Mr. G and the ZZ, both questioned his decision not to include comments, and he explained his reasoning. The applicant alleged that he was given no chance to add comments because Mr. G grabbed the evaluations to work on them himself, but Mr. G stated in his declaration that the applicant actually refused to add comments.

13. In light of the above evidence, CGPC concluded that Mr. G “stymied” the applicant’s efforts to submit accurate and timely evaluations. Regarding their timeliness, CGPC stated that Mr. G should have canceled the applicant’s annual leave if he really needed the evaluations revised and completed prior to his “self-imposed” three-week deadline. Regarding their accuracy, CGPC alleged that Mr. G should have discussed his disagreements with the applicant and, if the applicant stood by his evaluations, changed the ratings himself and added comments to explain the changes.

14. Under the Performance Management System, the evaluations had to be completed between April 1 and June 30, 1999. However, supervisors may certainly create shorter or interim deadlines for interim steps in the evaluation process. The record indicates that Mr. G found the evaluations to be untimely because he did not approve of their content and chose to wait until after the applicant returned from leave on April 26, 1999, to complete them. He could have changed the ratings himself and added comments with his reasoning, but he waited until the applicant’s return and then gave him just a couple of hours to revise the evaluations. The Board agrees with CGPC that the applicant’s submission of the evaluations on April 16, 1999, just two weeks after the end of the evaluation period, should not have been deemed untimely simply because his supervisor disagreed with the ratings. The Board finds that the applicant has proved by

a preponderance of the evidence that the OER comment regarding the untimeliness of the civilian evaluations is erroneous and unjust and should be removed.

15. The disputed comment about the civilian evaluations also criticizes their accuracy and narrative content, which are clearly within the purview of the supervisor to criticize, since the definition of the category "Evaluations" is the "extent to which an officer, as Reported-on Officer and rater, conducted or required others to conduct accurate, timely evaluations for enlisted, civilian and officer personnel." The applicant alleged that Mr. G caused him to prepare inaccurate evaluations by interfering with Ms. C's work without telling him, by "strongly suggesting" that he assign Mr. G a "meritorious" rating, and by being "blinded" regarding the quality of Mr. A's work. Mr. G strongly supported the disputed comments about the inaccuracy and poor quality of the evaluations in his declaration and in his notes for the OER. It is unclear from the record whose assessment of the employees' performance was accurate. The applicant alleged that he thought Mr. A's work was comparable to Mr. B's because Mr. A "made fewer administrative mistakes and seemed to keep a tighter rein on his assigned Contractors." However, his notes indicate that Mr. A frequently came to work late and occasionally came to work inebriated. No similar criticisms about Mr. B's work appear in the record. Moreover, the applicant indicated that his fear of a potential legal consequences was a major consideration in his preparation of the civilian evaluations.

16. Under the Performance Management System for civilian evaluations, however, Mr. G should not have tried to direct how the applicant evaluated his subordinates. From the record, it appears that Mr. G was either unaware of the rules or unwilling to exercise his own authority to change the evaluations to reflect his own assessment of the employees' relative merits. In light of Mr. G's stance, the Board agrees with CGPC that the applicant has proved that he was not free to evaluate his subordinates in accordance with his true assessment of their relative merits. Therefore, the final two comments in block 5 of the disputed OER should be removed, and the numerical mark should be raised from 3 to 4. Although the applicant asked for an even higher mark, the Board is not persuaded that he merited a mark of 5. Evidence in the record indicates that—whereas accuracy and fairness to the employees should have been his only considerations—he allowed his concern for the potential legal consequences of the evaluations and his resentment over not overseeing Mr. B's xxxx work affect the content of the evaluations. The applicant repeatedly stressed the fact that comments are not legally required for "proficient" ratings, but this does not mean that deleting all performance-based comments from an evaluation is fair to the employee or a better-than-average evaluation technique.

17. The mark of 3 for "Judgment" was supported by the following comment: "Judgment on some sensitive personnel issues & interactions w/ others sometimes missed the mark—often required involvement or intervention of superiors to adequately resolve/remedy problems." The applicant alleged that the mark was based solely on his preparation of the evaluations. Therefore, he argued, if the mark and comments for

“Evaluations” are to be corrected, the mark and comment for “Judgment” should be as well. However, in standing by his decision not to include any comments in the second round of evaluations, the applicant admitted that he acted against his “better judgment” as well as the advice of CDR S, Mr. G, and the ZZ. Moreover, in his declaration and notes, the ZZ amply supported the low mark for “Judgment” that he assigned the applicant. Although the applicant did receive an Achievement Award at the end of his tour and although other evidence in the record also indicates that the applicant sometimes exercised good judgment, the Board finds that the applicant has not proved by a preponderance of the evidence that the mark of 3 for “Judgment” and the corresponding negative comment in the disputed OER are erroneous or unjust.

18. The applicant asked the Board to remove his failures of selection by the Reserve LCDR selection board from his record. To determine whether the applicant’s failures of selection should be removed because he has proved that the mark of 3 for “Evaluations” and supporting comments in the disputed OER were erroneous and unfair, 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 [he] would have been promoted in any event?” *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982). The Board finds that the applicant’s record was clearly prejudiced by the low mark and negative comments regarding the civilian evaluations. However, when his record was reviewed by the selection boards in 2000 and 2001, it also showed (a) a mark of 3 for “Judgment” in the disputed OER, (b) a July 1998 OER with many comments that are guardedly positive, mediocre, or negative, and (c) no recommendation for promotion in an OER since June 1997. Therefore, the Board finds that, even without the low mark of 3 for “Evaluations” and supporting negative comments in the applicant’s record, it is unlikely that he would have been promoted in any event.

19. The applicant made numerous allegations with respect to his rating chain and other employees and officers at the Xxxxx. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

20. Accordingly, the applicant’s request should be granted in part by raising the mark for “Evaluations” on the disputed OER from 3 to 4 and by deleting the final two sentences in block 5: “Submission of civilian evaluations were [sic] not timely and had inaccurate/insufficient comments. Evaluation narratives were of poor quality and required substantive revisions by supervisor before submission.” The remainder of his request for relief should be denied.

ORDER

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

On his OER for the reporting period July 16, 1998, through May 28, 1999, the mark of 3 he received for "Evaluations" in block 5.f. shall be corrected to a mark of 4. In addition, the following two comments from block 5 shall be deleted from the OER: "Submission of civilian evaluations were [sic] not timely and had inaccurate/insufficient comments. Evaluation narratives were of poor quality and required substantive revisions by supervisor before submission."

No other relief is granted.

