

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-040

████████████████████
████████████████████

FINAL DECISION

██████████ **Attorney-Advisor:**

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 February 22, 2003 upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated November 20, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant, a retired lieutenant commander (LCDR; pay grade O-4), asked the Board to correct his record by removing an officer evaluation report (OER) for the reporting period May 1, 19xx to April 30, 19xx (the disputed OER). He also requested that all references to the disputed OER be expunged from his official military record and that all administrative actions taken against him based on the content of the disputed OER be invalidated, including his failures of selection by the 19xx, 19xx, 19xx, 19xx, and 19xx Commander (CDR) Selection Boards.

The applicant further requested, if he is retired at the time the Board renders its decision, that

- his retired status be corrected to show that he was retired in the rank of CDR with the date of rank he would have had if he had been selected by the 19xx CDR Selection Board;
- he be paid the difference in all retroactive pay and allowances from that date of rank; and

- he be paid the difference in all retired pay since his date of retirement.

APPLICANT'S ALLEGATIONS AND SUBMISSIONS

The applicant alleged that his chain of command and rating chain failed to adhere to Coast Guard regulations in effect at the time the disputed OER was prepared. See Article 10-A-4.g.(1) of the Personnel Manual (April 19xx). He asserted that, on April 30, 19xx (the end of the reporting period for the disputed OER), an investigation by the Coast Guard Investigation Service (CGIS) was pending against him concerning allegations of discrimination. He alleged that, when CGIS issued its report, none of the allegations were found to be substantiated nor were any charges preferred against him. He alleged that despite the impending CGIS report, his reporting officer (RO) used disputed information from the investigation to “materially alter” the disputed OER.

The applicant alleged that Coast Guard regulations restrict the content of a rating chain's narrative comments by, among other things, prohibiting remarks regarding any pending investigation or any investigation to which the rated officer was not made a party. He alleged that his rating chain ignored the mandate of these regulations and unjustly altered the content of the OER, while avoiding the use of the word “investigation” in the disputed OER. He alleged that such actions “skirted the spirit of [Coast Guard] regulation[s]” and permitted the RO to “take action against [the applicant] before the investigation was finalized.”

The applicant alleged that there is “no doubt about the source of information the [RO] used to alter his evaluation of [the applicant's] performance” during the period of the disputed OER. He alleged that a comparison of the disputed OER with the OER for the prior reporting period (May 31, 19xx through April 30, 19xx) reveals that the supervisor lowered the applicant's numerical scores and that the RO “dramatically changed” his comments in the disputed OER based on unproven allegations of discrimination. He pointed out that in Sections 3.c. (Results/Effectiveness) and 5.c. (Directing Others) of the disputed OER, his numerical scores were lowered to 4s from the 5s he was assigned in the preceding OER and that in Section 3.d. (Adaptability) of the disputed OER, his numerical score was lowered to a 4 from the 5s he was assigned in corresponding sections (4.a., (Working with Others) and 4.b., (Human Relations)) in his preceding OER.

The applicant further alleged that his numerical score of 4 in Section 5.f. (Evaluations) of the disputed OER is contradicted by the supervisor's supporting narrative in the Section 5 Comments section. He asserted that the score of 4 is “merely ‘average,’ ” and inconsistent with the supervisor's comments regarding the applicant's “Herculean effort” in evaluating nine civilian employees—eight of which had the same due date. He alleged that the score he received for Section 5.f. was obviously influenced by other scores in Section 5 that were lowered based on unproven allegations of

discrimination. He alleged that the supervisor had “no personal observation nor any valid input from other officers or civilians to substantiate his lowering of the numerical score.”

The applicant pointed out that the RO (1) lowered all of the numerical scores assigned in Section 8 (personal and professional qualities) to 4s in the disputed OER from the 5s and one 6 assigned in the preceding OER and (2) “dramatically changed” his (the RO’s) comments in the disputed OER from those given in the preceding OER. He also pointed out that the RO lowered the applicant’s comparison scale rating from the “distinguished performer” rating he received in the preceding OER to “only a ‘good performer’” in the disputed OER. He alleged that according to the Personnel Manual, it was improper for the supervisor and the RO to base their evaluations of the applicant upon allegations of civilian employees who were subordinate to the applicant. He alleged that because he disputed the allegations and his co-workers and raters indicated to investigators that none of the alleged discriminatory behavior had ever been observed, none of the allegations against him could be independently supported.

With respect to the comments in Section 8 of the disputed OER concerning the applicant’s taking responsibility for “mis-[communications and] delayed action that allowed the workplace environment to deteriorate,” the applicant asserted the following:

Like any good leader, [the applicant] did take responsibility for the Branch he was in command of, but disputed that any of his actions directly led to a deterioration in the workplace environment. It was [the applicant’s] stated position that the actions and mis-perceptions of the complainants which [sic] were the root of the problems in the Branch. However, the comments section correctly indicates that he worked with the Command to resolve those problems.

The applicant contended that every officer is entitled to a complete and accurate record before each promotion board which considers him. He alleged that a comparison of the disputed OER and the preceding OER demonstrates that his performance, “other than those sections affected by issues related to the unproven discrimination allegations [which had been] under investigation,” was excellent. He alleged that actions taken by his rating chain regarding the pending investigation and subsequent references to those actions tainted his official military record and led to his failure of selection not only before the 19xx Commander (CDR) Selection Board but also before the four subsequent CDR selection boards.

Excerpts from the Disputed OER (May 1, 19xx to April 30, 19xx)

On the disputed OER, the applicant received eight marks of 5 (on a scale of 1 to 7, with 7 being best) and ten marks of 4 in evaluation of his job performance. The

applicant was assigned the following scores in the eighteen performance categories of the disputed OER:

Block 3.a. (Planning and Preparedness)	5	Block 5.c. (Directing Others)	4
Block 3.b. (Using Resources)	5	Block 5.d. (Teamwork)	4
Block 3.c. (Results/Effectiveness)	4	Block 5.e. (Workplace Climate)	4
Block 3.c. (Adaptability)	5	Block 5.f. (Evaluations)	4
Block 3.d. (Professional Competence)	5	Block 8.a. (Initiative)	4
Block 4.a. (Speaking and Listening)	5	Block 8.b. (Judgment)	4
Block 4.b. (Writing)	5	Block 8.c. (Responsibility)	4
Block 5.a. (Looking Out for Others)	5	Block 8.d. (Professional Presence)	4
Block 5.b. (Developing Others)	5	Block 8.e. (Health and Well-Being)	4

In block nine (Comparison Scale), he was assigned a score of 4, defined as “good performer; give tough, challenging assignments.”

In the comments section of block 4, the supervisor made the following statements regarding the applicant’s communication skills: “[h]andled self well in difficult discussion sessions with [executive officer]; calm & confident, candid discussions in difficult personnel situation; similarly during intensely stressful session with staff members” Furthermore, in the comments section of block 5, the supervisor wrote that the applicant “[e]valuated 9 civilians (8 w/same due date) thoroughly [and] properly—Herculean effort.”

In the comments section of block 7, the RO concurred with the supervisor’s remarks and made the following statements:

[The applicant] faced numerous internal/external challenges, [especially] in the work [environment] during the period; he experienced some success by support[ing command] initiated acts that promoted conflict resolution & team-building. Succeeded in providing outstanding [work-life services] to [X District Commands] & kept staff ‘customer focused’ while attempting to resolve internal issues.

In the comments section of block 8, the RO made many positive statements, but also the following comment: “[t]ook respons[ibili]ty for mis-comm[unications and] delayed action that allowed the workplace enviro[nment] to deteriorate.”

In block 10, the RO provided the following comments on the applicant’s potential to assume greater leadership roles and responsibilities:

[The applicant] has been a good performer during a period of great challenge, some personal and some internal [within] his [work-life Branch]. He has had to expend an enormous [amount] of energy, time, and focus towards resolving internal [personnel and management] issues; successful resolution of many of these challenges have lead [sic] to

personal/professional improvements that will make him a better Officer and [supervisor/manager]. He has [demonstrated] the [k]nowledge, [j]udgment, & [leadership] expected of a mid-manager and he should be considered for promotion to O-5 with his peers. He is recommended for a tougher/more challenging assignment

Summary of Applicant's Relevant Evidence

Applicant's Affidavit

The applicant submitted his own affidavit in support of his application for relief. In it, he stated that in October 19xx, two female civilians filed formal complaints against him, alleging that they were being treated differently in the workplace compared to their male co-workers. He stated that as a result of the complaints, the Coast Guard began an investigation, which was still pending on the date the disputed OER was submitted to CGPC and remained so, he believed, until 19xx.

The applicant stated that he "denied and vigorously disputed" the allegations of discrimination against him in emails and memoranda to, and during conversations and meetings with, officers in his rating chain and in his chain of command. He stated that he also sent a memorandum to the informal equal employment opportunity (EEO) counselor and met with the integrated support command's (ISC) military civil rights officer denying the allegations and expressing his concern about the "false discrimination allegations." Additionally, he stated, the allegations were disputed by testimony from co-workers who witnessed the events that were alleged to be discriminatory.

The applicant asserted that the statements submitted by his supervisor and executive officer (XO) to the Department of Transportation (DOT) Inspector General's (IG) investigator contain "narrative which supports [his] position in disputing the allegations of discrimination." He stated that his XO's statement outlines the reorganization of the branch he headed and states that he was not the person who created the reorganization.

The applicant stated that on November 17, 19xx, he was issued a "performance counseling" memorandum, wherein his supervisor dealt with the "contested and unproven" allegations against him as fact. He stated that the same officer served as his supervisor for the period of the preceding OER, when his performance was evaluated as excellent. He asserted that the allegations—then under investigation—improperly and unfairly influenced the content of the disputed OER.

The applicant stated that on July 10, 19xx, he received a copy of the disputed OER and submitted an OER Reply on July 24, 19xx. He stated that his OER Reply, which "clearly addressed the performance issues mentioned in his OER, was endorsed by his RO and forwarded for filing in his official military record.

The applicant stated that, upon his request, his XO (CDR E) and CO (CAPT M)¹ reviewed his military record and discussed it with his Operations Officer (CDR C). He stated that the three senior officers, who had extensive experience with OERs, told him that his record appeared excellent with the exception of the disputed OER. He stated that the three senior officers also told him that it was unquestionably the only entry in his record which could have caused his failures of selection.

The applicant stated that in 19xx, he was awarded the Coast Guard Achievement Medal for superior performance of duty from May 19xx to June 19xx. He asserted that among other achievements, he was awarded the medal based on the following:

- exceptional interpersonal skills;
- the accomplishment of a “multi-disciplinary approach to [human services] casework planning”; and
- implementation of an innovative annual conference which accomplished annual Ombudsmen training plus Family Advocacy Training for area COs in a pioneering effort to “reduce costs and enhance synergy between COs and their Ombudsmen.”

He further stated that his above-noted innovation was recognized as “best practice” and followed by other ISCs and that his successful partnerships, organizational skills, and knowledge were recognized. He asserted that his skills and performance from 19xx to 19xx were reflected in the award citation, not the disputed OER.

The applicant stated that he had not been provided with a copy of the CGIS investigation report despite the fact that discrimination and complaints were directed against him. He stated that on November 17, 19xx, his counsel filed a request through the Freedom of Information Act (FOIA) to obtain a copy of the report. However, no response was received.

Letter from CAPT M

In support of his contentions, the applicant submitted a memorandum, dated February 15, 19xx, from CAPT M regarding his opinion on the applicant’s OER record. It states the following:

As you requested in [your email dated February 15, 19xx], I am stating my opinion that the OER in your service record covering the period [of the disputed OER] most likely was the cause for the fact that you failed selection for promotion to CDR during previous selection board proceedings.

¹ CDR E and CAPT M were the applicant’s XO and CO, respectively, during the evaluation period of May 1, 19xx through April 30, 19xx.

I reviewed your entire performance record at your request and with your knowledge when I was your Commanding Officer at [xxx] sometime during the summer of 19xx. The purpose of this review was to improve the value of my career counseling to you.

SUMMARY OF THE RECORD

The applicant received his commission as an ensign on May 18, 19xx. He was promoted to lieutenant junior grade on November 18, 19xx, to lieutenant on May 18, 19xx, and to lieutenant commander on June 1, 19xx.

On January 16, 19xx, the applicant was designated a Coast Guard Xxxx upon his successful completion of the prescribed course of instruction. From January 17, 19xx to June 12, 19xx, he was assigned to Coast Guard ██████████ in XXXX, XXXXXX and XXXXX, XXXXX. From June 13, 19xx to June 25, 19xx, he served as a XXXX XXXX for the XXXX District and an Integrated Support Command in XXXXX, XXXXX. From June 26, 19xx through April 30, 19xx, the applicant was assigned to a Coast Guard XXXXX in XXXXX, XXXXXX. After repeated failures of selection for promotion to CDR, the applicant retired on June 1, 19xx.

By memorandum dated, July 24, 19xx, the applicant submitted a communication to the 19xx CDR Selection Board. It reads as follows:

From: [applicant's name], [applicant's SSN], USCG
To: Commander, Coast Guard Personnel Command (CGPC-opm-1)
Subj: INPUT TO THE COMMANDER SELECTION BOARD
Ref: (a) My ltr 1402 of 16 July 19xx
(b) Officer Evaluation Report dated 8 June 19xx

1. I appreciate the consideration given to my previous request, reference (a). I respectfully must say that the *process* of considering reference (b) without a thoroughly processed OER Reply is unfair, in my view. An OER Reply is forthcoming. I, however, wish to thank the Board for the opportunity to communicate directly.
2. This evaluation period has been a time of significant personnel challenges requiring the assistance of two outside consultants. Additionally, my tour in XXXX has been marked by repeated personal tragedies, beginning with the unexpected death of my father in September, 19xx; followed by the death of a prematurely born daughter in November, 19xx; and ending with the premature death of my mother in September, 19xx. Despite these personal tragedies and professional challenges, I continued to show innovation, *dedication* and initiative in my work—characteristics I have displayed throughout my career.
3. Significant initiatives first developed by my staff and subsequently supported by the command, included relocation of the XXXXX XXXX to the XXXX XXXX Division and a promotion of one staff GS-11 to GS-12 through the innovative use of a vacant billet. I also

pioneered a combination training conference composed of the annual XXXX Conference plus the annual XXXX XXX Training (for COs/XOs in our area of responsibility). Combining these formerly separate conferences resulted in improved synergy and reduced costs.

4. The strength I have shown during this marking period speaks highly of my character, in my view. I respectfully thank the Board for consideration of this additional input.

[signature]

IEWS OF THE COAST GUARD

On July 31, 2003, the Chief Counsel of the Coast Guard submitted an advisory opinion to which he attached a memorandum on the case prepared by CGPC. In adopting the analysis of CGPC, the Chief Counsel recommended that the Board deny the applicant's request for relief.

The Chief Counsel argued that the applicant submitted an untimely application and has provided no basis or reason why it is in the interest of justice to excuse the delay. He alleged that the applicant's request, dated February 5, 2003, was submitted more than xxxxx months beyond the time limit for filing an application for correction. He asserted that the applicant appears to claim in his application that his non-selection for promotion tolled the timeliness requirement of his applying to the Board. He argued that the applicant's "*post facto* conclusion that the [disputed] OER caused his non-selection does not constitute a substantive reason for untimely submission." He argued that the applicant should have applied to the Board upon receiving the disputed OER if he believed that it was prepared erroneously. Accordingly, he argued, the Board should not waive the three-year filing requirement and should dismiss this application for lack of timeliness.

With respect to the merits of the case, the Chief Counsel argued that the disputed OER is a fair and accurate evaluation of his performance. He argued that for the applicant to establish that an OER is erroneous or unjust, the applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992). He argued that in determining whether an applicant has met his burden, the applicant's rating chain 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 (Fed. Cir. 1992); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979).

The Chief Counsel argued that the applicant presented no evidence to support his allegations that his supervisor "had little personal observation and no input from other officer or civilians to substantiate his lowering of the numerical score." He stated that contrary to the applicant's allegations, the Reported-on Officer (ROO) answers on a daily basis to and receives a majority of direction from the Supervisor. He further

argued that the applicant failed to elaborate why he believes that reports, in general, from subordinates are not reliable information for the supervisor to rely upon for purposes of evaluating the applicant. He stated that according to the Personnel Manual, there is no prohibition on the RO's accepting information from numerous sources beyond the direct observations of the RO.

The Chief Counsel argued that the applicant has failed to prove that the narrative comments contained in the disputed OER were improper. He stated that Article 10.A.4.f.1. of the Personnel Manual does not prohibit rating chain officials from commenting on conduct that is the subject of a judicial, administrative, or investigative proceeding. He asserted that the disputed OER contained no forbidden references to any investigation within the contested OER. He further argued that because Section 5.e. (workplace climate) requires the evaluation of an officer's "ability to ... promote an environment of involvement, innovation, open communication and respect," the narrative comments regarding "internal/external challenges, especially in the work environment," without any reference to any investigation, were not inappropriate.

The Chief Counsel asserted that the applicant's claim that his marks in the disputed OER were incorrectly "lowered" from those in his preceding OER is without merit. He argued that the Personnel Manual clearly provides that a ROO's performance and qualities are compared against standards set forth in the OER, not against other officers or the same officer in a prior reporting period. See Article 10.A.4.c.4.b. of the Personnel Manual. He argued that the applicant's receipt of better ratings and an award either before or after the disputed OER is irrelevant to the matter before the Board, as that neither proves that the information within the disputed OER did not reflect the applicant's actual performance during the evaluation period.

The Chief Counsel argued that the regulations provide that the appropriate remedy to contrast the applicant's views of his performance against his rating chain's views was to submit an OER Reply. See Article 10.A.4.g. of the Personnel Manual. He asserted that despite the applicant's claim that he submitted an OER Reply on July 24, 19xx, the record fails to support that claim, as his record does not include a reply, and his application did not include such evidence. He argued that the Board should consider the absence of evidence proving his prior objection to the disputed OER as probative evidence that upon receipt of the disputed OER, the applicant accepted his rating chain's characterization of his performance as described therein. He recommended that the applicant submit a copy of the validated OER Reply to Coast Guard Personnel Command (CGPC) for review and inclusion in his official OER record. However, he asserted, no nexus to the applicant's failing for selection to CDR would be created by the foregoing relief.

The Chief Counsel asserted that the only information to support the applicant's claim that there was an investigation laid into allegations of discrimination against him

is found in the applicant's application to the Board. He moreover argued that the applicant presented no clear, cogent and convincing evidence to support his assertion that his RO used "the information from the [CGIS] investigation" ... "to alter the content" of the disputed OER. On the contrary, he argued, a review of the applicant's record in this case supports the conclusion that the disputed OER "represents the honest professional judgment of those responsible for evaluating the applicant under the Officer Evaluation System (OER)."

Lastly, the Chief Counsel stated that although the applicant claims that his counsel filed a Freedom of Information Act (FOIA) request to obtain a copy of the EEO/Discrimination Reports of Investigation from the Inspector General's Office in the Department of Transportation, EEO/Discrimination cases are exempt from FOIA regulations and the applicant should not expect to receive a copy of the Report of Investigation. He argued that because the applicant has not provided evidence that overcomes the presumption of regularity regarding the construction of and marks associated with the disputed OER, the applicant has failed to meet his burden in proving an error or injustice in his case.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 4, 2003, the Chair sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 30 days. On September 4, 2003, the applicant responded by stating that he had several objections to the advisory opinion.

The applicant argued that the Chief Counsel incorrectly asserts that the applicant's submission is untimely. The applicant stated that because the applicable law that tolls the Board's three-year limitation period has neither been amended nor overturned, the Board must reject this argument.

The applicant argued that contrary to the Chief Counsel's assertion, the context in which the errors made to the disputed OER occurred are relevant to the Board's decision and should be considered to determine whether the effect was significant or negligible on the applicant's entire record.

The applicant stated that the Chief Counsel erroneously disputes the fact that he (the applicant) submitted an OER Reply. He argued that the absence of the OER Reply from the record reveals that Coast Guard action in this case was flawed, thereby rebutting the presumption of regularity. He argued that because the Coast Guard failed to properly file the reply in his military record, his record was not complete, fair and accurate when considered by subsequent selection boards.

The applicant argued that his sworn affidavit is "clear, cogent, and absent any rebutting evidence from the Coast Guard, ... convincing." He argued that based on the

fact that his application concerns “sensitive” matters regarding his performance, very few individuals would possess knowledge about information relevant to his claims. Thus, he argued, his affidavit is “even more convincing.”

The applicant asserted that the Coast Guard is aware of the fact that files relating to formal complaints are maintained by the Department of Transportation(DOT), if not by the Coast Guard. He stated that the records may have been overlooked by the Coast Guard because the agency, rather than the applicant, is named as the respondent.

Applicant’s Submissions in Support of his Response to the Advisory Opinion

Applicant’s Submission to the 19xx Promotion Board and OER Reply

In support of his response to the Coast Guard’s advisory opinion, the applicant submitted a copy of a memorandum, dated July 24, 19xx that reads as follows:

From: [applicant’s name], [applicant’s SSN], USCG
To: Commander, Coast Guard Personnel Command (CGPC-opm-1)
Via: Commanding Officer, Integrated Support Command XXXXX

SUBJ: INPUT TO THE COMMANDER SELECTION BOARD AND OER REPLY

Ref: (a) Officer Evaluation Report dated 8 June 19xx
(b) Phoncon between XO (ISC [xxx])/[applicant’s name] of 23 July XX

1. I recognize and appreciate my command’s efforts to accurately evaluate my performance. I must, however, respectfully submit the following Officer Evaluation Report Reply as a rebuttal to sections eight and nine of [the disputed OER]. The process of considering [the disputed OER] without a thoroughly process OER Reply is unfair, in my view. I, however, wish to thank the Board for the opportunity to communicate directly.

2. I object to a statement contained in the OER comments: “Took responsibility for [miscommunications] and delayed action that allowed workplace [environment] to deteriorate.” I discussed this passage with my Executive Officer (Reporting Officer), [phoncon between XO and applicant on July 23, 19xx], who provided two specific examples relative to this comment:

a. Delay in processing of Overtime Claims for one General Schedule employee: While it is true that the process unfolded too slowly and I accepted my share of responsibility for an approximately six week delay in processing this claim, I must point out the following items, noted below. I object to any negative impact on the evaluation of my *character*. (emphasis in original.)

1. No process was in place and no budget was identified at the time to pay Personnel Services Division General Schedule overtime. I initially submitted the first ever request for pay to my Personnel

Services Division Chief two days after receipt as I did not have the authority to approve overtime pay. It was returned to me having not been approved by my Division Chief due to a lack of funding, which was true at the time. (Subsequent claims for other events were submitted by the employee).

2. I discussed the first claim with the employee and expressed my support and viewpoint that she should receive pay if such was due to her. I expressed my intention to resubmit the claim by providing additional information from an appropriate reference. Additional information, from the Code of Federal Regulations for example, was subsequently provided to my Division Chief. Although my actions became delayed, *I had proactively been very supportive of the employee, as exhibited through my conversation with her. This event did not cause the "workplace environment to deteriorate."* (emphasis in original.)
3. Throughout the evaluation period, I awarded a significant quantity of compensation time in lieu of overtime pay for those employees so requesting, pursuant to authority that had been delegated to me. No complaints have been expressed from any employee in the area of compensation-time.
4. I promptly responded to a status question from the employee and forwarded a recommendation to the Comptroller that the employee's overtime should be paid.
5. A claim that this episode "allowed the workplace environment to deteriorate" is questionable and I object to that assertion, pending the outcome of a current investigation. My delay in processing the claims occurred in the summer of 19xx.

b. Inadequate communication to my staff regarding our system of "acting" branch chief: The system, formerly referred to as "deputy branch chief" by my staff, was implemented in August, 19xx. The Executive Officer described an episode involving the "acting" branch chief to me in September 19xx. I recall no complaints or questions ever expressed to me by any staff member until October, 19xx. I responded appropriately to all guidance on this difficult issue. The command supported the "acting" branch chief's continued service in this duty, but implemented a rotation in December, 19xx, through which the duties would be shared by two appropriate persons.

3. Significant initiatives first developed by my staff or myself, and subsequently supported by the command, included relocation on the XXXXX Program to the XXXXX Division and a promotion to one staff GS-11 to GS-12 through the innovative use of a vacant billet.
4. Block seven of the OER comments on my branch's continued "outstanding" service delivery despite "internal issues." These "issues," described in block nine as a "deterioration," had no effect on our service delivery-noted in the OER. Continued excellent service to the field constituted a significant achievement performed at a time of great personal challenge for me (death of a prematurely born daughter November, 19xx and the premature, tragic death of my mother in September, 19xx). The *strength* I've

shown speaks *highly* of my character; an assessment inconsistent with an across-the-board score of "4" in block eight. (emphasis in original.)

[signature]

First Endorsement on Applicant's letter of July 24, 19xx

The applicant also submitted a copy of the First Endorsement to his "INPUT TO THE COMMANDER SELECTION BOARD AND OER REPLY." It is summarized as follows:

By memorandum, dated July 27, 19xx, the applicant's RO wrote in support of the marks and comments he assigned the applicant in Section 8 (Personal and Professional Qualities). He stated that the applicant's performance "clearly met, but did not exceed, the standards as described for a mark of 4 in each of the individual qualities." He stated that the two examples he provided the applicant with were not intended to be all-inclusive" but were provided to help the applicant understand how the comments reflect performance the RO observed during the evaluation period.

During the evaluation period, the RO stated, he met with the applicant to discuss "how his [the applicant's] managerial style may have contributed to some of the challenges he was experiencing as the XXXXXX." He asserted that based on the applicant's OER Reply, "it appears that [the applicant] is still experiencing difficulty in accepting any responsibility for the workplace environment that continues to challenge both him and the command.

The RO stated that he reviewed the mark he assigned the applicant on the comparison scale and finds that it also accurately reflects where the applicant measures in relation to other officers in the applicant's rank whom the RO has known and who have worked for him during his Coast Guard career.

Other Supporting Correspondence

As attachments to his response to the Coast Guard's advisory opinion, the applicant submitted copies of several letters from his counsel to the DOT Office of Civil Rights and FOIA Division requesting copies of the investigation file and report of investigation.

The applicant also submitted a copy of an email, dated June 12, 19xx, from Coast Guard's XXXXXX, that his counsel received in response to an inquiry regarding the release of the Report of Investigation. The response stated that the office had no authority to release the Report of Investigation but could furnish a copy of any statements the applicant provided to DOT investigators. He was also advised therein to

submit a FOIA request to DOT's Departmental Office of Civil Rights, should he desire this information.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 5.B.3.c.1. of the Personnel Manual (COMDTINST M1000.6A) in effect in 19xx provides that members who are "eligible for consideration by a selection board may communicate directly with the board by letter arriving by the date the board convenes," pursuant to 10 U.S.C. § 573(f).

Article 10.A. of the Personnel Manual governs the preparation of OERs and provides that each OER is prepared by the reported-on officer's "rating chain" of senior officers: the supervisor, the reporting officer (RO), and the reviewer. Article 10.A.1.b.1. provides that commanding officers "must ensure accurate, fair, and objective evaluations" are provided to all officers under their command. Article 10.A.2.b.2.f. states that commanding officers are required to provide oversight and accountability for the proper preparation of OERs.

Article 10.A.1.b.2. states that individuals are responsible for managing their performance and has the responsibility to determine job expectations and performance feedback to meet or exceed standards

Article 10.A.1.c.4.b. defines the Supervisor as the individual to whom the ROO answers on a daily or frequent basis and from whom the ROO receives the majority of direction and requirements. In accordance with Article 10.A.2.d.2.a., the supervisor is responsible for evaluating the ROO's performance in the execution of his or her duties.

Article 10.A.2.e.2.a. states that the RO shall base evaluations on direct observations, the Officer Support Form (OSF) or other information provided by the supervisor, and other reliable reports and records. Article 10.A.4.c.4.b. states that the supervisor "shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period" ... and "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."

Article 10.A.4.c.4.e. states that comments should amplify and be consistent with the numerical evaluations and should identify specific strengths and weaknesses in performance, 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. Article 10.A.4.c.4.g. states that a mark of four represents the expected standard of performance.

Article 10.A.4.f.1. governs the rating chains comments about the ROO. It states that members of the rating chain shall not mention the officer's conduct is the subject of a judicial, administrative, or investigative proceeding, including criminal and non-judicial punishment proceedings, or any other investigation. It also provides that these restrictions do not preclude comments on the conduct that is the subject of the proceeding, only reference to the proceeding itself.

Article 10.A.4.f.10. provides that comments addressing the ROO's marital or family status are prohibited.

Article 10.A.4.g. describes how members should reply to an OER, should they choose to do so. Article 10.A.4.g.1. states that "[t]he Reported-on Officer may reply to any OER regardless of its content and have this reply filed with the OER," allowing a member the opportunity to "express a view of performance which may differ from that of a rating official."

Article 10.A.4.g.8. provides the following format in which the OER reply is to be submitted:

Date: (Submitted to Supervisor)

From: (RANK, NAME, SSN, USCG/USCGR)
To: Commander, Coast Guard Personnel Command (opm-3)
Via: (1) (Original Supervisor by name)
(2) (Original Reporting Officer by name)
(3) (Original Reviewer by name)

Subj: OER REPLY

Ref: (a) Personnel Manual, COMDTINST M1000.6 (series)
1. As authorized by reference (a), I request the below reply be filed with my evaluation report for the period (YR, MONTH, DAY) to (YR, MONTH, DAY).

Signature

The standards on the OER form for a mark of 4 for the performance category of "evaluations" (section 5.f) is as follows:

Evaluations	Reports consistently submitted on time. Narratives were fair, concise, and contained specific observations of action and impact. Assigned marks against standards. Few reports, if any, returned for revision. Met own OER Responsibilities as Reported-on Officer.
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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. Although approximately xxxxxx years have passed between the applicant's notification of the disputed OER and his application to the Board, the Soldiers' and Sailors' Civil Relief Act of 1940 (Act), 50 U.S.C. § 501 et seq., as amended, bars any period of active duty military service from being included in computing a statute of limitations against a person in the military service. See Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994). The running of the time granted to file this BCMR application was tolled until the applicant was retired from the Coast Guard on June 1, 19xx. The applicant's BCMR application was filed on February 13, 2003. Thus, his claim 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. The applicant made several allegations about his rating chain improperly using unproven information from the CGIS investigation in drafting information from the disputed OER. However, neither the evidence he submitted nor his military record supports his contentions. The applicant claimed that his rating chain included prohibited remarks regarding the CGIS investigation by "skirting the spirit" of Coast Guard regulations. The restriction in Article 10.A.4.f.1. of the Personnel Manual does not preclude comments on the underlying facts of an investigation that are known to the rating chain, so long as no reference is made to pending investigation proceedings. The record shows that the disputed OER contains no reference to the CGIS investigation. Moreover, the applicant submitted no explanation as to how the comments he was assigned in the disputed OER violated the foregoing provision.

4. The applicant also claimed that information from the CGIS investigation was "the only possible source [used] to alter" the disputed OER. However, the fact that the disputed OER was drafted when the CGIS investigation report was pending is not sufficient in and of itself to demonstrate that the content was inappropriately influenced by the ongoing investigation. Absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (Fed. Cir. 1992). Consequently, the Board finds that the applicant has not proved by a preponderance of the evidence that the his rating chain improperly included information from the CGIS investigation in the disputed OER.

5. The applicant asserted that his rating chain improperly relied upon complaints made by “civilians who were subordinate to him” in evaluating his performance during the period of the disputed OER. Under Article 10.A.2.e.2.a. of the Personnel Manual, a reporting officer is permitted to base his or her evaluation of the ROO’s performance on “...other reliable reports or records.” The applicant has submitted no evidence beyond his own affidavit that the complaints made by the two civilians were, in fact, considered in rating his performance. Absent corroboration, the applicant’s statements alone are insufficient to demonstrate the alleged inaccuracy of the disputed OER. Vierrether v. United States, 27 Fed. Cl. 357, 367 (1992). Consequently, the Board finds that the foregoing evidence is insufficient to establish that the applicant’s rating chain relied upon the complaints made by the two civilians. However, even assuming *arguendo* that the complaints from the two civilians were relied upon in rating his performance, the applicant has not shown by a preponderance of the evidence that those complaints were unreliable.

6. In assessing an officer’s performance, members of a rating chain are directed to review the ROO’s performance and qualities observed and noted during the reporting period. See 10.A.4.c.4.b. of the Personnel Manual. Accordingly, the supervisor and RO are required to limit marks and comments in the OER to events that occurred during the reporting period. In alleging that his supervisor and RO “lowered” his marks and/or “dramatically changed” comments from those assigned in his preceding OER, the applicant urges the Board to compare his evaluation in the disputed OER against that which he received during the prior OER period and find that the disputed OER is erroneous and unjust—in direct contradiction to the regulations. Contrary to the applicant’s assertions, the regulations provide that an officer’s performance and qualities are to be compared “against the standards ... and not to the same officer in a pervious reporting period.” Therefore, the Board finds that the applicant’s performance prior to the period of the disputed OER is not determinative of the accuracy of the disputed OER.

7. The applicant alleged that the supervisor’s narrative comments in section 5.f. (Evaluations) of the disputed OER support a higher numerical score than the 4 assigned. He asserted that because the score of 4 is “merely ‘average,’” it conflicts with the supervisor’s narrative statement that the applicant “[e]valuated 9 civilians (8 [with the] same due date) thoroughly [and] properly—Herculean effort.” The Board agrees with this allegation. The Personnel Manual provides that narrative comments should paint a picture of an officer’s performance that “compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.” See Article 10.A.4.c.7.e. of the Personnel Manual. It is clear from the supervisor’s comment that the applicant’s efforts exceeded that “[r]eports [were] consistently submitted on time,” and that he “[a]ssigned marks against standards,” as required for a mark of 4 in the category of “Evaluations.” Accordingly, the Board finds that the

applicant has proved by a preponderance of the evidence that a disparity exists between the mark of 4 and the "Herculean effort" described by the supervisor in the supporting the narrative comments and, therefore, that the numerical score in the category of "evaluations" should be raised to a mark of 5.

8. The applicant alleged that the comments he received in section 8 concerning his "[taking] respons[ibility] for mis-comm[unications and] delayed action that allowed the workplace enviro[nment] to deteriorate," did not accurately reflect his performance. However, to establish that marks or comments in an OER are erroneous or unjust, the applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Cl. Ct. 1446, 1460 (1992); BCMR Docket No. 86-96. Therefore, the applicant's uncorroborated statement is "simply not enough to overcome the presumption that military officers ... discharge their duties faithfully." Vierrether at 367. The applicant's objection to the comments assigned in section 8 does not suggest or prove that the OER is factually erroneous, but rather, indicates only that his opinion of his performance differs from that of his rating chain. In fact, the applicant has submitted no corroborating evidence to contradict any of the disputed marks and comments in the disputed OER, apart from the internal inconsistency discussed in finding 7.

9. The applicant asserted in his response to the advisory opinion that his record was not a fair and complete depiction of his performance before the selection boards that considered him because the Coast Guard failed to include his OER reply in his military record. According to the Personnel Manual, the OER reply, which requires a specific format for proper submission, provides an officer with an opportunity to officially express a view of his or her performance that may differ from the views of members of his or her rating chain. See Articles 10.A.4.g.1. and 10.A.4.g.8. of the Personnel Manual. In this case, the alleged OER reply, not filed in the applicant's military record but submitted with his response to the Chief Counsel's advisory opinion, purported to be both a communication to the CDR selection board and an OER reply. As such, the Board is persuaded to find that because the reply/communication failed to comply with proper format, as required by Article 10.A.4.g.8., and contained comments addressing his family status, as prohibited by Article 10.A.4.f.10., it was appropriately rejected. Moreover, according to the record, the applicant submitted a separate communication to the 19xx CDR Selection Board, entitled "INPUT TO THE COMMANDER SELECTION BOARD." In that communication, the applicant asserted that "[a]n OER Reply is forthcoming." However, the applicant has not presented any persuasive evidence that he subsequently submitted a proper OER reply. Consequently, the Board finds that, with the exception noted in finding 7, the applicant's record, as presented to the selection boards that considered him, was a complete and accurate depiction of his performance during the period of the disputed OER.

10. Having found that the Coast Guard committed an error by assigning the applicant a mark of 4 in the category of "Evaluations," the Board must determine whether this error prejudiced the applicant before the CDR Selection Boards. In determining whether a nexus exists between such an error and an applicant's failure to be selected, the Board applies the standards set forth in Engels v. United States, 230 Ct. Cl. 465 (1982) by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?" The Board finds that the inclusion of the mark of 4 in the category of "Evaluations" makes his record appear very slightly worse than it would have in its absence. However, the Board further finds that, in light of the nine remaining marks of 4 in the disputed OER, it is unlikely that the applicant would have been selected for promotion even if the error had not been in the disputed OER when it was reviewed by the CDR Selection Boards.

11. Moreover, by the time the 19xx, 19xx, 19xx, and 19xx CDR Selection Boards met, the applicant's record included, respectively, one, two, three, and four more recent OERs which portrayed the applicant's performance in an even more positive light than the disputed OER. However, even with the improved OERs, the applicant was subsequently passed over for promotion to CDR. Consequently, the Board is not persuaded that the mark of 4 in the category "Evaluations" had any impact on his potential for selection for promotion to CDR between 19xx and 19xx.

12. The Board has carefully considered all of the applicant's contentions. Those not specifically addressed above were found to be without merit and/or not dispositive of the case.

13. Accordingly, partial relief should be granted as stated in finding 7 with respect to the disputed OER by raising the mark of 4 in the category "Evaluations" to a mark of 5.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

The mark of 4 for the category "Evaluations" in block 5.f. of the OER for the period May 1, 19xx to April 30, 19xx shall be raised to a mark of 5. All other requested relief is denied.

