

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2005-053**

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**FINAL DECISION**

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This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on January 24, 2005, upon receipt of the completed application.

This final decision, dated November 17, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant asked the Board to remove from his record an officer evaluation report (OER) covering his performance during a short tour as the Operations Officer of the *Xxxxxx*, a high-endurance cutter, from May 1, 1998, to April 27, 1999. He also asked the Board to remove his failure of selection for promotion to captain in 2004; to back-date his date of rank as a ██████████ to what it would have been had he been selected for promotion in 2004 instead of 2005; and to award him back pay and allowances.

The applicant alleged that in 1998, having been selected for promotion to commander, he was hoping for an assignment as the Executive Officer (XO) of a cutter. However, he agreed to fill a vacancy for an Operations Officer for one year in exchange for a guaranteed 18-month follow-on tour as an XO. During May, June, and July 1998, he attended pipeline training, and he reported to the *Xxxxxx* as Operations Officer on August 12, 1998. The applicant alleged that upon his arrival, he discovered that his predecessor had been ordered off the cutter by the Commanding Officer (CO). Moreover, he learned that the *Xxxxxx* had had four different Operations Officers within the prior three years. Morale was very low, and the CO had created an atmosphere of "fear and mistrust." He found that the CO "regularly belittled and yelled at junior officers for

minor mistakes," lost his temper, and cussed at them in front of enlisted members. He alleged that the CO would scream at his subordinates, even the XO, over very minor matters, such as not attending an optional pyrotechnics training. He alleged that "the CO's regular violent and irrational public treatment of officers created a dysfunctional command climate for officers and crew alike." He alleged that most of them tried to avoid the CO, but he had to interact with the CO frequently.

As Operations Officer of the *Xxxxxx*, the applicant alleged, he "consistently mirrored the command's goals and never deviated from his primary focus on the cutter's safe and effective operation." The cutter was at sea for seven of the nine months he served on board. He alleged that while he was aboard, the cutter "flawlessly performed all directed operations, including the highly visible xxxxxxxx capsized and recovery during a stormy winter [REDACTED]"—a mission that contributed to the cutter's earning a "Battle E" award.

In May 1999, the applicant left the *Xxxxxx* and became the XO of a middle-endurance cutter on the [REDACTED], in accordance with his agreement with the afloat detailer. Upon his departure from the *Xxxxxx*, he inquired about his OER, and the XO told him that he had completed his part as Supervisor and that it was in the CO's inbox. However, the applicant did not receive it and so called the *Xxxxxx* sometime in the fall of 1999 and asked its new XO about his OER. The new XO asked the CO about it and told the applicant that the CO had responded by saying that he had planned to "fire" the applicant and "put him ashore in some Mexican or Central American Port" because the applicant had shown "gross disrespect to his commanding officer and was incompetent." The CO also said that he was still working on the applicant's OER. Thereafter, the applicant alleged, both he and the Coast Guard Personnel Command (CGPC) made repeated inquiries about his OER. The CO was also holding up the OERs of the former XO, the Engineering Officer, and the Weapons Officer. The CO did not complete the OERs until May 15, 2000, just before he departed the *Xxxxxx*.

The applicant pointed out that the marks in the disputed OER "are far lower than [his] career average ... and there is no comment regarding his potential for promotion." In addition, "none of the extremely derogatory comments [the CO] had made about him orally to [the new XO of the *Xxxxxx*] are included." Moreover, on the very important Comparison Scale on the OER, the CO gave him an "average" mark in the fourth position, whereas the applicant had not received a Comparison Scale mark lower than the fifth position since he was a lieutenant. The applicant argued that the CO violated the Personnel Manual when he delayed the OER by a year, failed to include a comment on the applicant's potential for promotion, and awarded him numerical marks that are inconsistent with the comments. The applicant argued that his record would have been better and that he would have been selected for promotion if this erroneous OER had not been in his record when the selection board reviewed it in 2004.

The applicant argued that regulation requires that OERs be submitted to CGPC within 45 days of the end of the evaluation period "to ensure accurate and dependable performance information ... . Logically, the longer the time between a service member's performance and the issuance of the command's assessment of that performance, the less reliable it must be deemed." The applicant argued that because the CO completed the OER a year late, the CO's assessment of his performance "could not possibly be accurate nor should it be relied upon to determine [the applicant's] potential for promotion to captain. ... [N]othing about that OER can be deemed reliable or useful. Even the comments and marks by [the XO], who had departed the command by the time [the CO] finally found time to sign and forward the OER, cannot be relied upon since there is no way to know what, if any, data originally submitted by [the XO] still remains."

The applicant alleged that he never received any negative feedback from the CO and was surprised by what the CO said to the new XO when he inquired about his OER. He stated that the CO's "startlingly derogatory remarks, made to an officer who had no official need to know, perhaps explain the low numerical marks on [the applicant's] OER but make the accompanying positive comments all the more baffling."

The applicant argued that the CO's failure to include a recommendation regarding promotion in the disputed OER violated Article 10.A.2.e.2. of the Personnel Manual and therefore prejudiced his record before the selection board. He stated that the comment that he had recently been selected for promotion to commander was "worthless and unenlightening ... for the purposes of determining [his] potential for promotion," which is one of the primary purposes of comments in that block of an OER. He argued that because COs customarily include a recommendation for promotion in an OER and all his other OERs had such recommendations, the lack of one in the disputed OER "was a devastating omission that would hardly go unnoticed by a selection board."

The applicant stated that except for a lack of a recommendation for promotion, the comments in the OER reflect his outstanding performance. He alleged that the numerical marks are too low and thus are inconsistent with the comments. He alleged that the two marks of 4 (on a scale of 1 to 7, with 7 being best) he received in the performance categories "Looking Out for Others" and "Workplace Climate" are especially inconsistent, considering the "glowing corresponding comments" he received to support them. He argued that the comments show that his performance in these areas clearly exceeded the expected standard mark of 4. Therefore, he argued, it is possible that the comments were written by the XO, who had a high opinion of his work, but that the numerical marks assigned by the XO were subsequently changed by the CO, contrary to regulation, and thus are now "wildly divergent" with the comments.

The applicant argued that the marks throughout the disputed OER are too low and "obviously out of synch" with the comments and "plainly aberrant when compared with OERs received throughout the rest of his career." However, he stated, the most egregious error in the OER is the mark on the Comparison Scale in the fourth (middle)

position. He alleged that this mark is inconsistent with his actual performance and with other Comparison Scale marks he has received. In support of his allegations, he submitted three sworn statements, which are summarized below.

### *Statement of the EO*

The Engineering Officer (EO) stated that from 1997 to 2000, he “observed questionable treatment [by the CO] of his Wardroom and Executive Officer numerous times.” He stated that the CO was known as a “screamer” after two incidents in which he yelled at junior officers for their improper actions. Although the CO had reason to be upset during those incidents, he stated, it was not acceptable for the CO, in another incident, to yell at the XO in front of the crew about a boat operation that the XO was not involved with. The EO alleged that “[d]uring this instance the leadership and command climate became dysfunctional, leaving the chain of command ineffective.”

The EO stated that the CO never gave any positive or constructive feedback to his subordinates. Although the cutter received a prestigious award during the applicant’s tour, the CO put it in a box on his shelf instead of mounting it for the crew to enjoy. The EO also stated that under the CO’s command, no department head or XO ever received an end of tour award even though they performed many critical missions flawlessly. Moreover, the EO stated, the CO withheld his own OER and that of the XO, as well as the applicant’s, for more than a year.

The EO stated that he worked with the applicant on a daily basis and thought “his work onboard was exemplary and always mirrored the command’s goals.” He stated that the applicant’s focus was always on the safe and effective operation of the cutter. He alleged that the “command climate” on the Xxxxxx “was so poor and dysfunctional that no evaluation provided by [the CO] could be considered an accurate evaluation of the member’s performance and should be discarded.”

### *Statement of the Electronics Division Officer, a Chief Warrant Officer*

The Electronics Division Officer (EDO) stated that the applicant was his immediate supervisor aboard the Xxxxxx. Prior to the applicant’s arrival, the cutter had “gone through four OPS Department Heads, each relieved for performance issues” since August 1996. The EDO stated that the applicant was a competent Operations Officer and one of the best supervisors he has had. He stated that the applicant “saved” the department and should have received an award for his performance on the cutter.

The EDO called the wardroom “a sorrowful place” under the CO’s command. Most officers “walked around with their heads down.” The EDO stated that the CO “only verbally assaulted [him] once” when he reported for an expected briefing on his last day on the cutter. When he reminded the CO of why he was reporting, the CO “threw his hands up in the air and asked [him] if [he] was serious and if [he] was

stupid," so the EDO left without the "out brief." The EDO further stated, he "can recall personally witnessing unfathomable outbreaks from him on three occasions." On one occasion when he was in training on the bridge, the CO ordered the officer of the deck to give the EDO control of the ship and then ordered the EDO to drive the ship "pretty aggressively" through some Russian fishing vessels on the Marine Boundary Line." The cutter came within 100 yards of one of the fishing vessels and "[t]he whole Command Cadre turned very white." The CO then began yelling at the officer of the deck. When the XO suggested that they discuss the matter elsewhere, the CO yelled at the XO and stormed off the bridge. Another time, the CO called all of the officers to the wardroom and yelled at them over a matter so minor that the EDO could not believe the CO was upset about it. On a third occasion, the CO yelled incomprehensibly at the officer of the deck while they were approaching a port. Finally, the EDO stated, he rarely saw the CO as the CO never ate in the wardroom and never invited guests to his cabin.

### *Statement of the Subsequent XO*

The XO who began serving on the Xxxxxx after the applicant departed stated that "[o]ne issue which started out as a minor irritation for [the CO] and later turned out to become a major source of professional and command embarrassment ... was the subject of extremely late officer evaluation reports." When he reported aboard, the outgoing XO told him that the OERs were written and in the CO's in-box. Therefore, he assumed all was well until the applicant contacted him in the late fall of 1999 to ask about his missing OER. When the XO asked the CO about the OER, the CO stated that the applicant had shown "gross disrespect to his commanding officer and was incompetent." The XO responded by stating that if the CO was serious, the OER should reflect the applicant's poor performance. The CO replied that he was still working on the OER. Thereafter, the XO was asked several times by the applicant and the Officer Personnel Management Division to try to "break the OER out of the cabin." At the time, the Engineering Officer, the Weapons Officer, and the prior XO also had OERs awaiting signature by the CO. The CO did not complete them until just before leaving the Xxxxxx. The XO noted that when the CO completed the applicant's OER, it had none of the negative comments or marks that he had previously discussed with the CO and that the CO never explained his behavior regarding the extremely late evaluations.

## **SUMMARY OF THE RECORD**

Commissioned in [REDACTED], the applicant was first assigned to a cutter as a deck watch officer. He was promoted to lieutenant junior grade on [REDACTED]. In [REDACTED], he was assigned to a base in xxxxxxxx as an assistant marine environmental response officer and later became the base administrative officer. From [REDACTED] [REDACTED], the applicant served as a Group Operations Officer, managing operations for a variety of small boats and tugs and a marine safety office. He was promoted to lieutenant on [REDACTED]. From [REDACTED], the applicant served as a supply officer on a high endurance cutter. Seven of his early

OERs lack express recommendations about promotion but discuss his potential for assuming increased responsibility or his recent selection for promotion to the next rank. From [REDACTED], he attended graduate school under orders to receive a master's degree in [REDACTED]. He was promoted to lieutenant commander on [REDACTED].

From [REDACTED] the applicant served as the chief of a marine safety and occupational health section and assistant chief of a safety and environmental health branch. In the first OER he received at this post, he received three marks of 5, sixteen marks of 6, and four marks of 7 in the performance categories and a mark of 6 on the Comparison Scale.<sup>1</sup> In addition, the Reviewer added a page of very positive comments with a mark of 6 on the Comparison Scale. His Reporting Officer highly recommended him for promotion. In the second OER he received at this post, the applicant received one mark of 5, sixteen marks of 6, and six marks of 7 in the various performance categories and a mark of 6 on the Comparison Scale. His Reporting Officer "highly recommended [the applicant] for accelerated promotion at the earliest opportunity." In addition, the Reviewer added a page of positive comments with a mark of 5 on the Comparison Scale. In the third OER the applicant received in this position, he received eleven marks of 6 and seven marks of 7 in the performance categories, and a mark of 6 on the Comparison Scale. In addition, the Reviewer added a page of very positive comments with a mark of 6 on the Comparison Scale. Both the Reporting Officer and the Reviewer included comments recommending the applicant for accelerated promotion. The applicant received a Commendation Medal upon his departure from the unit.

From August 12, 1998, to April 27, 1999, the applicant served as the Xxxxx's Operations Officer. On April 10, 1999, he initiated his OER by submitting his own input. The marks and comments he received for this period appear in the chart below.

**MARKS AND COMMENTS IN DISPUTED OER**

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	5	Volunteered to fill critical shortage HEC Ops for one year. Period included [REDACTED] counterdrug deployment & 2 [REDACTED], including US/CIS Maritime Boundary Line (MBL) and Bering Sea SAR Standby ... Great insight and prep as patrol planner; superb results in tactical operations including LE tactics off Central America, MBL incursion detection and SAR standby positioning. Coordinated joint helo ops w/CGC [REDACTED] VERTREP/UNREP w/ USN FFG & Oiler, CTU reliefs and all air support. Full utilization & understanding of HEC
3b	Using Resources	5	

<sup>1</sup> The Comparison Scale is not actually numbered. However, as with the performance categories, there are seven possible marks. A mark in the middle, or fourth, position means that the officer, in comparison with all other officers of the same rank whom the Reporting Officer has known throughout his career, is an "exceptional performer; very competent, highly respected professional." A mark in the fifth position means that the officer is a "distinguished performer; give tough, challenging, visible leadership assignments." A mark in the sixth position means that the officer is "strongly recommended for accelerated promotion." A mark in the seventh and highest position means that the officer is the "best officer of this grade" known to the Reporting Officer throughout the Reporting Officer's career.

3c	Results/ Effectiveness	6	shipboard C2 system contributed significantly to reliable comms with TACON, SAR plan and tactical briefs. Negotiated best patrol schedule possible thru partnering with TACON; result was optimized endurance, quality log stops and max R&R for crew. All commitments professionally executed, with consistent on time performance ... Excellent shiphandler, consistently "go to" for tight maneuvers, including complex moorings in [REDACTED] and heavy wx SAR towing ops ... Coaches JO's during moorings; evolutions consistently successful building confidence in junior shiphandlers. TAO for all drills and GUNEX including totally integrated live fire exercises of all weapons systems. Successfully managed complex high tempo operations, complete with extensive reporting requirements; deployments required concurrent management and execution of 114 aircraft control hrs; 11 TACON shifts; 23 radio circuits; over 10,000 msgs; 5 comms shifts, 19 boardings, 12 SAR cases and 1 MBL incursion.
3d	Adaptability	5	
3e	Professional Competence	5	
4a	Speaking and Listening	5	Good verbal communication skills; Ability to persuade and motivate personnel led to sustained excellent mission performance. Prepared brief for VADM & [REDACTED] CO on MBL ops; excellent briefer/tactical insight. Responsible for drafting all operational msg traffic & reports, typically well crafted and comprehensive. Drafted significant organizational correspondence, including largest section of COMDT Quality Award submission, sensitive admin investigation, Y2K plan, revision to CO Battle Orders, as well as 7 awards.
4b	Writing	5	
5a	Looking Out for Others	4	Coordinated and conducted over 12 trng sessions for OOD's; expanded JO knowledge of systems, techniques and procedures...Successfully coached JO's thru over 20 special shiphandling evolutions building confidence & proficiency...Worked extensively with low performers to motivate & modify behavior; in all cases, result was improved performance w/o administrative action...Led understaffed/inexperienced dept thru 3 challenging patrols and two short inport periods with extremely ambitious equipment grooms, installs and certifications, including demanding WLR-1(H) install; install was completed ahead of schedule and resulted in successful calibration/final certification. Significantly bolstered team concept and cohesion within Comms & Nav divisions, historically wrought w/ personality clashes and disharmony; both divisions running smoothly despite diverse makeup and critical personnel shortages. Assumed active role as senior dept head/OOD, providing guidance to significantly junior peers. ...As active XO, intervened on 3 occasions during potentially volatile incidents, preventing escalation & promoting amenable conflict resolution for member & Command. ...Extensive use of employee reward and recognition; drafted numerous personal awards for good performance; Effective leadership evidenced through 10 subordinate promotion this period. All evals and OERs conscientiously prepared & on time.
5b	Developing Others	5	
5c	Directing Others	5	
5d	Teamwork	5	
5e	Workplace Climate	4	
5f	Evaluations	5	
6	Signature of the XO as the applicant's Supervisor, dated April 15, 1999		
7	Reporting Officer's Comments	NA	Concur w/ supervisor. Assumed OPS Boss role immediately amidst [REDACTED] w/o relief and made significant and immediate improvements to watchstanding, shiphandling, OOD training, and unit Combat Systems procedures. Partnered w/ TACON & OPCON to ensure best possible patrol schedule; enhanced crew morale and subsequently, crew performance. Well prepared; stayed one step ahead during operations and kept CO/XO well informed during high op tempo. Effective in leading obstinate and diverse dept; achieved good performance and teamwork.
8a	Initiative	5	Immediately sought out ways to add value early on; vast improvements in navigation procedures and nav briefs; assumed Unit Safety Supervisor role due to previous training in safety/industrial hygienics. On own time assisted [REDACTED] CG w/ voyage planning for [REDACTED] transit. Sound judgment; does not hesitate to assume positive control of bridge or CIC watch; particularly during high stress or high tempo evolutions. Significant participant in command overhaul of quality initiatives; integral player in development of command vision, business plan and significant quality improvements during the period. Considerable prof devlpmnt; qualified mast of Sail Training Vsl [REDACTED]; maintains merchant master's license & World Safety Organization government credentials...Is lead author of international science journal manuscript submission titled, [REDACTED] Represented Command/CG during official visits to [REDACTED] Mayor's Offices & MX Naval Flag O's. Superb physical/uniform appearance; promotes fitness through daily workout regimen.
8b	Judgment	5	
8c	Responsibility	5	
8d	Professional Presence	5	
8e	Health & Well- Being	6	
9	Comparison Scale	4	NA
10	Potential	NA	Deserving of his recent selection to O-5. Demonstrated excellent initiative, dedication and self-confidence in the extremely demanding and challenging position of HEC Operations Officer; Full utilization of HEC C2 system has resulted in higher operational proficiency and enhanced mission capability; made significant and lasting contributions to operational readiness...A very proficient shiphandler and an effective leader. Well-rounded and professionally diverse; maintained safety credentials as well as Merchant Mariner's License despite demanding

			workload. Recommended for assignments of greater responsibility; fully qualified for and deserving of assignment as Executive Officer of a WMEC.
11	Signature of the CO as the Reporting Officer, dated May 15, 2000		
12	Signature of the Reviewer, dated June 13, 2000		

From June 1999 through May 2001, the applicant served as the XO of a cutter. On January 7, 2000, he was promoted to commander. On his first OER as an XO, he received three marks of 5, twelve marks of 6, and three marks of 7 in the various performance categories and a mark of 5 on the Comparison Scale. His CO recommended him for promotion with his peers and highly recommended him for command afloat. On his second OER in this position, the applicant received three marks of 5, eleven marks of 6, and four marks of 7 in the performance categories and a mark of 5 on the Comparison Scale. His CO recommended him for promotion with his peers. The applicant received a Commendation Medal for his service on this cutter.

From May 2001 through March 2003, the applicant served as the [REDACTED]

On his first OER in this position, he received one mark of 5, eight marks of 6, and nine marks of 7 in the performance categories and a mark of 7 on the Comparison Scale. His Reporting Officer, a brigadier general, strongly recommended him for promotion. The Reviewer, a Vice Admiral, added a page of comments concurring in the evaluation and recommending the applicant for accelerated promotion with a Comparison Scale mark of 6. On his second OER in this position, the applicant received seven marks of 6 and eleven marks of 7 in the various performance categories and a mark of 7 on the Comparison Scale. His Reporting Officer strongly recommended him for promotion at the earliest opportunity and noted that the applicant had potential to serve at flag rank (rear admiral and above). The Reviewer added a page of comments concurring in the evaluation (but commenting that the numerical marks might be inflated) and recommending the applicant for accelerated promotion with a Comparison Scale mark of 6. The applicant received a Defense Meritorious Service Medal for this service.

From April 2003 through the date of his application, the applicant served as the [REDACTED]. On his first OER as CO, dated March 31, 2004, he received eleven marks of 6 and six marks of 7 in the performance categories and a mark of 5 on the Comparison Scale. His Reporting Officer strongly recommended him for promotion to captain "with best of peers." In July 2004, the applicant was not selected for promotion. In his second OER as CO, dated March 31, 2005, the applicant received six marks of 6 and twelve marks of 7 in the performance categories and a mark of 6 on the Comparison Scale. His Reporting Officer highly recommended him for accelerated promotion ahead of his peers. In June 2005, the applicant was awarded a Meritorious Service Medal. In July 2005, he was selected for promotion to captain.

#### IEWS OF THE COAST GUARD

On June 8, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. He based his decision in part on a memorandum on the case submitted by the Commander of the Coast Guard Personnel Command (CGPC) and on signed statements by the CO and XO of the *Xxxxxx*.

CGPC stated that the lack of a comment regarding the applicant's potential for promotion is not a violation of policy or of the Personnel Manual. CGPC argued that the rating chain fulfilled the requirements of Article 10.A.4.c.9.b. of the Personnel Manual by including comments about the applicant's potential for greater leadership roles and responsibilities in the disputed OER. CGPC also argued that although OERs are supposed to be completed no later than 45 days after the end of an evaluation period, lateness *per se* is not a sufficient reason to remove an OER from an officer's record. CGPC alleged that the untimeliness of the OER did not render the applicant's record incomplete for any board, panel, or personnel management decision.

CGPC alleged that the applicant "provided no evidence that the disputed OER failed to accurately portray his performance." CGPC pointed out that the statement by the XO (see below) indicates that the CO did not change the marks he had assigned and argued that the applicant's allegation that the CO changed the XO's marks is therefore "unfounded and extremely irresponsible." CGPC argued that the marks in the OER are not inconsistent with the comments and that the comments appropriately support the marks of 4 and 5 assigned by the XO. CGPC stated that a mark of 4 is not a low mark but "the standard performance mark that describes the high level of performance expected of all Coast Guard officers."

CGPC argued that the applicant's comparison of the disputed OERs with others he has received over the course of his career is inappropriate and irrelevant because rating chains evaluate an officer by comparing his performance to the written standards on the OER form, not to his performance during other periods. Regarding the mark of 4 on the Comparison Scale, CGPC stated that since the mark represents the CO's ranking of the applicant in comparison with all other lieutenant commanders the CO had known, the fact that the Comparison Scale mark on the disputed OER is lower than others the applicant has received does not mean that it is erroneous.

CGPC also argued that the applicant's assessment of a poor command climate on the *Xxxxxx* is "not consistent with the documented superior achievements of the unit" under the CO's leadership. CGPC noted that under the command of the CO, the *Xxxxxx* was awarded the Commandant's Quality Award, Bronze Award, for which the criteria are excellent "leadership, strategic planning, customer and mission focus, measurement, analysis and knowledge management, human resource focus, process management, and performance results"; and the "Battle E" for operational excellence. CGPC argued that the *Xxxxxx*'s receipt of these awards disproves the applicant's claim of a dysfunctional command climate on board.

Finally, CGPC noted that the applicant did not timely appeal the disputed OER but waited until after he failed of selection for captain. CGPC stated that the applicant should have availed himself of the OER Reply process or timely appealed the OER to the Personnel Records Review Board if he believed it was inaccurate. CGPC also noted that in 2004, the applicant did not avail himself of the opportunity to submit a letter to the selection board. Therefore, CGPC argued, the criticism of the disputed OER is both “recently conceived” and unproven.

*Statement of the CO of the Xxxxxx*

The CO stated that the marks and comments in the disputed OER accurately portray the applicant’s performance on the Xxxxxx. He alleged that the applicant’s allegations about his conduct and leadership constitute gross distortions and misrepresentation of the facts. The CO alleged that during numerous exit interviews, Xxxxxx crewmembers complained to him about the applicant’s “belittling manner and poor leadership skills.” The CO stated that he counseled the applicant about this problem, but the applicant “accepted constructive criticism poorly.” He alleged that the EDO’s “story” about his attempt to do an out brief “is pure fabrication” and that the “pyrotechnics ‘incident’ was caused by many officers, including [the applicant], not reporting to mandatory training who were found watching videos in the wardroom instead, a point made to me by numerous crewmembers during the training. I expected better leadership from them than that.” The CO alleged that the subsequent XO’s statement about his response to the applicant’s inquiry about his late OER is also “pure fabrication.”

The CO alleged that the morale in the applicant’s department was poor and his relationships with other department heads and chief petty officers were often stormy. The CO alleged that the applicant “improved steadily as a ship handler but remained a poor coach during the period in question.” He also alleged that the preparation for the award, which the applicant took credit for, was spearheaded by the ship’s yeoman. The CO stated that because the applicant was filling a billet below his grade level, he initially expected better performance. The applicant’s “operational skills were improving” and “to fully support the numerical marks [in the disputed OER], the narrative was made deliberately strong, but should not be construed as justification for higher numerical marks.”

Regarding the lack of a recommendation for promotion, the CO stated that the applicant “was not performing at the Commander level while aboard XXXXXX, and his performance in such a junior billet would not enable me to make a recommendation for selection to captain.”

*Statement by the XO of the Xxxxxx*

The XO stated that as the applicant's direct Supervisor, he was responsible for preparing the disputed OER. He stated that in accordance with customary practice, he prepared the marks and comments in the Supervisor's portion of the OER and drafted comments and recommended numerical marks for the CO's portion as well. The XO stated that after reviewing the disputed OER, he does not detect any changes to the marks he assigned or to the comments. In addition, he stated, it appears that the CO accepted all but one of his recommendations for numerical marks in the CO's portion. He stated that he believes he recommended a higher Comparison Scale mark than the one the CO chose, but noted that choosing the Comparison Scale mark was within the sole discretion of the CO as Reporting Officer.

The XO stated that in drafting the comments for the disputed OER, he intentionally omitted a recommendation for promotion because the applicant had already been selected for promotion to commander, but was not yet promoted; had performed a short tour on the *Xxxxxx*; and was slated for assignment as the XO of a cutter. Therefore, the applicant "had already achieved the assignment and promotion points that I would have felt qualified to recommend. His subsequent potential for assignment as Commanding Officer and promotion to Captain would be determined by his performance during his subsequent assignments, particularly as an O-5 Executive Officer."

The XO alleged that the applicant's "assertion that [the CO] failed to provide numerical marks that reasonably compare to the OER comments regarding [the applicant's] performance is without merit. Indeed, the comments were carefully crafted to justify those marks. While I do consider [his] performance to be above average, I would argue that comments like 'effective in leading obstinate and diverse dept; achieved good performance and teamwork' are not superlative in nature."

In light of these statements by the CO and XO and CGPC's memorandum, the JAG argued that "there is nothing in the record to show that the OER was anything other than a fair and accurate evaluation of Applicant's performance." CGPC stated that the XO timely prepared the OER and made recommended marks and comments which the CO could properly rely on pursuant to Article 10.A.2.e.2.a. of the Personnel Manual, which states that the Reporting Officer may rely on "direct observation, the OSF or other information provided by the Supervisor, and other reliable records and reports." Citing *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992), the JAG argued that the OER should not be removed from the applicant's record because he has failed to show a "clear and prejudicial violation of a statute or regulation."

The JAG argued that the applicant's failure to file an OER Reply or to seek relief from the PRRB "should be considered as relevant evidence that he accepted his rating official's characterization of his performance as described in the OER at issue. While not determinative of his due process rights to apply to the BCMR, his failure to act is probative of his state of mind upon receipt of the disputed OER."

The JAG also argued that the quality of the applicant's other OERs is irrelevant to the accuracy of the dispute OER. He noted that in *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981), the court held that "the fact that this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied."

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

On June 15, 2005, the Chair sent the applicant copies of the views of the Coast Guard and invited him to respond within 30 days. The applicant was granted an extension and responded on August 1, 2005.

The applicant argued that the CO's denials that he fostered a negative command climate "ring hollow." He pointed out that the CO did not name any of the crewmembers who are alleged to have complained about him during their departure interviews. The applicant also pointed out that the comment in the disputed OER that he enhanced the morale and performance of the crew contradict the CO's allegations about how he treated the crew. He alleged that comments in the disputed OER about his ship handling and coaching of junior officers conflict with the CO's current allegations about his performance. In addition, he alleged that comments in the OER about his contribution to the "Battle E" award conflict with the CO's statement regarding the project being spearheaded by the ship's yeoman.

The applicant argued that the statements by the EO and EDO refute the CO's allegations about his relations with other department heads and chief petty officers. He also pointed out that whereas the XO described his performance as "above average," and CO alleged that it was "poor." In addition, the applicant pointed out that the CO's claim that he did not know that the applicant had a pending assignment as the XO of a cutter conflicts with the XO's statement that he knew about it and therefore did not include a recommendation for promotion in the OER. The applicant alleged that it is unimaginable that the CO did not discuss the matter with the XO and know that the applicant had been promised a follow-on position as an XO. The applicant argued that even if the CO was unaware of his next assignment, his ignorance "is evidence, at the very least, of a serious disconnect between [the CO] and his XO as well as members of his wardroom." The applicant argued that the CO's "one-page statement of generalized denials, devoid of corroborating information or even names of individuals who might be called upon to offer relevant testimony, makes no sense" and "should not be relied upon." In addition, he argued that the XO's "vague and largely unenlightening statement adds nothing of substance to the questions before this Board" and fails to corroborate the CO's assertions.

Finally, the applicant alleged that the fact that the CO altered the XO's recommended mark on the Comparison Scale "certainly suggests that other marks were later

altered by [the CO] as well" even if, after five years, the XO cannot detect any other changes.

## **APPLICABLE REGULATIONS**

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. of the manual in effect in 1999 provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Article 10.A.2.c.2.d. provides that an officer should initiate his own OER by completing his part of the OER form and submitting his input no later than 21 days before the end of the reporting period. An officer is also supposed to inform CGPC if he does not receive an official copy of an OER within 90 days after the end of a reporting period.

Article 10.A.4.d.4. of the Personnel Manual provides that a Supervisor should prepare assign the reported-on officer marks in the first thirteen performance categories in accordance with the written descriptions of performance on the OER form. Written comments are to be added to support the marks, particularly those that are higher or lower than a 4. Written comments are supposed to be consistent with the marks. Article 10.A.2.d.2. states that the Supervisor should complete his part of the OER and submit it to the Reporting Officer no later than 10 days after the end of the reporting period.

Article 10.A.2.e.2.e. provides that the Reporting Officer completes the remainder of the OER and submits it to the Reviewer no later than 30 days after the end of the reporting period. Article 10.A.2.e.2.c. states that the Reporting Officer "shall return a report for correction or reconsideration if the Supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed ... ." Article 10.A.4.c.7.d. provides that in preparing an OER, the Reporting Officer "shall draw on his or her own observations, information provided by the Supervisor, and other information accumulated during the reporting period." Article 10.A.4.c.8.a. states that the Reporting Officer completes the Comparison Scale 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.4.c.9. provides that in block 10 of an OER, the Reporting Officer "shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard. ... Comments in this section reflect the judgment of the Reporting Officer and may include, but are not limited to, the following: - Qualification to assume the duties of the next grade. - Specialties or types of assignment, such as command, for which the Reported-on Officer is qualified or shows aptitude. - Recommendations for selection to a senior service school. - Special talents or skills ... ."

Article 10.A.2.f.2. provides that it is the responsibility of the Reviewer to ensure that an OER “reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential.” Article 10.A.2.f.2. states that the Reviewer should submit an OER to CGPC no later than 45 days after the end of the reporting period.

Article 10.A.4.g. allows an officer to file a reply to his OER, within 15 days of receiving a copy of it, to “express a view of performance which may differ from that of a rating official.” The reply is forwarded up the rating chain, whose members may attach written responses, before being entered in the officer’s record with the OER by CGPC.

## 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.<sup>2</sup>

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. 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.<sup>3</sup> Once an applicant has rebutted the presumption of regularity by presenting at least some evidence that “specifically and convincingly contradicts his rating officials’ marks and comments,”<sup>4</sup> 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 disputed OER.<sup>5</sup> 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.<sup>6</sup> 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.

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<sup>2</sup> *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940 “tolls the BCMR’s limitations period during a servicemember’s period of active duty”).

<sup>3</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979); see 33 C.F.R. § 52.24(b).

<sup>4</sup> See CGBCMR Docket No. 2000-194.

<sup>5</sup> 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).

<sup>6</sup> *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

4. The applicant argued that the disputed OER should be removed from his record because his CO, the Reporting Officer, delayed completing his duties with respect to the OER for one year even though Article 10.A.2.e.2.e. of the Personnel Manual requires a Reporting Officer to submit an OER to the Reviewer no later than 30 days after the end of the reporting period. The applicant argued that the delay rendered the OER inherently unreliable and inaccurate. However, even a clear violation of the Personnel Manual does not justify removal of an OER unless the violation was prejudicial.<sup>7</sup> This Board has long held that delay *per se* is insufficient to justify removal of an otherwise accurate OER.<sup>8</sup>

5. The applicant alleged that his CO violated the Personnel Manual by failing to include a recommendation regarding promotion in block 10 of the disputed OER. However, as CGPC pointed out, Article 10.A.4.c.9. of the Personnel Manual requires only that a Reporting Officer “comment on the Reported-on Officer’s potential for greater leadership roles and responsibilities in the Coast Guard.” Block 10 of the disputed OER contains several comments that speak to the applicant’s potential for greater responsibilities and leadership roles: “Deserving of his recent selection to O-5. ... an effective leader. ... Recommended for assignments of greater responsibility; fully qualified for and deserving of assignment as Executive Officer of a WMEC.” Although a Reporting Officer *may* comment on an officer’s “[q]ualification to assume the duties of the next grade” and many if not most OERs do contain a recommendation regarding promotion in block 10, there is no requirement for the Reporting Officer to make an express recommendation for or against promotion. In this regard, the Board notes that, contrary to the applicant’s claim, seven of his early OERs as an ensign, lieutenant junior grade, and lieutenant contain no recommendation for or against promotion but, instead, discuss his potential for assuming increased responsibility and/or his recent selection for promotion to the next rank.

6. The applicant alleged that his CO lowered marks in the Supervisor’s section of the disputed OER, in violation of Article 10.A.2.e.2.c. of the Personnel Manual. His evidence in support of this allegation consists of (a) his own opinion that the comments in the Supervisor’s section would support higher marks; (b) the statement by a subsequent XO that the CO told him that the applicant had “showed gross disrespect to his commanding officer and was incompetent,” and that he had responded by suggesting that the OER should reflect this opinion; and (c) the Supervisor’s belief that the CO assigned the applicant a lower mark on the Comparison Scale than the one he recommended. This evidence is quite inadequate to prove that the Reporting Officer lowered marks in the Supervisor’s section of the OER. It does not overcome the presumption of

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<sup>7</sup> *Hary*, at 708.

<sup>8</sup> *See, e.g.*, CGBCMR Docket Nos. 2003-110; 2002-015; 43-98; 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority); and 475-86.

regularity much less prove the alleged impropriety.<sup>9</sup> Moreover, the Supervisor has submitted a statement indicating that after reviewing the final OER, he does not believe that the Reporting Officer changed any of the marks or comments he assigned in the Supervisor's section. The Supervisor also indicated that he believes that the Reporting Officer accepted all of his recommendations for marks and comments in the Reporting Officer's section of the OER with the exception of the Comparison Scale mark, which, in accordance with Article 10.A.4.c.8.a. of the Personnel Manual, is an inherently subjective mark to be assigned at the discretion of the Reporting Officer.

7. The applicant alleged that the disputed OER should be removed from his record because it provides an inaccurately low assessment of his performance. As evidence, he pointed to alleged inconsistencies between the marks and comments in disputed the OER; to other, much better OERs in his record; and to inconsistencies between varying descriptions of his performance in the XO's and CO's statements and in the OER. Regarding the allegations of inconsistency between the marks and the comments in the disputed OER, the Board agrees with the XO that the comments are not so superlative that they are inconsistent with the marks of 4 and 5 in the OER given the written standards for those marks on the OER form. The OER does have significantly lower marks on average and on the Comparison Scale than the applicant's prior OERs as a lieutenant commander and later OERs as a commander. However, as the JAG argued, the fact that an officer has "had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied."<sup>10</sup> Nor does the fact that, five years after the OER was completed and in response to the applicant's accusations and criticism, the CO has voiced negative opinions of the applicant's performance that appear to contradict some of the positive comments in the OER convince the Board that the OER is inaccurate.

8. The applicant alleged that the CO acted irrationally on several occasions, was a poor leader, and could not accurately assess his performance. In support of these allegations, he submitted statements by the EO and EDO, who indicated that morale in the wardroom was low and described a few incidents in which the CO lost his temper for reasons they thought were insufficient or nonexistent. He also submitted a statement by the subsequent XO, who reported that the CO once expressed a very poor opinion of the applicant's performance that was not reflected in the disputed OER. The Board finds that this evidence is insufficient to prove that the CO was unfit to assess the applicant's performance accurately in the OER. The Board notes that neither the EO nor the EDO indicated that the CO displayed any bias against the applicant. Moreover, it is apparent from the record that in completing the OER, the CO relied heavily on the

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<sup>9</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that absent strong evidence to the contrary, Government officials are presumed to have performed their duties "correctly, lawfully, and in good faith"); see 33 C.F.R. § 52.24(b).

<sup>10</sup> *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981).

recommendations of the XO, as he was allowed to do.<sup>11</sup> The applicant has presented no evidence of any bias or unfitness on the part of the XO, who assigned the applicant the two marks of 4 in the performance categories “Looking Out for Others” and “Workplace Climate.”

9. The applicant has not overcome the presumption of regularity or proved by a preponderance of the evidence that the disputed OER is erroneous or unjust. Moreover, the record indicates that the delay in the submission of the OER did not cause his record to be incomplete while under review by any board or panel. Therefore, the Board finds that his CO’s excessive delay and failure to complete and submit the OER to CGPC in accordance with the timeline provided in the Personnel Manual has not prejudiced his career and so constitutes harmless error. The applicant has not shown that the CO’s delay was a *prejudicial* violation of Article 10.A.2.e.2.e. of the Personnel Manual.

10. Accordingly, the applicant’s request should be denied.

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

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<sup>11</sup> Personnel Manual, Art. 10.A.4.c.7.d.

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

