

**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. 2006-085**

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**TECHNICAL AMENDMENT**

This proceeding was conducted under the provisions of section 1552 of title 10 and in response to a request by the Judge Advocate General (JAG), dated August 15, 2007, to return the Final Decision in Docket No. 2006-085 to the Board for a technical amendment of the order in accordance with 33 C.F.R. § 52.73.

**BACKGROUND**

In the application for BCMR Docket No. 2006-085, the applicant asked the Board to remove from his record an officer evaluation report (OER) for the period April 1, 2002, to March 31, 2003, when he was serving as the xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx at a Coast Guard training center. The disputed OER contained five low marks of 3 (on a scale of 1 to 7, with 7 being best), ten marks of 4, and three marks of 5 in the various performance categories and a mark in the fourth spot on the comparison scale. While serving in the same billet, the applicant had previously received OERs with marks of 4, 5, and 6 from a prior supervisor and reporting officer. In support of his request, the applicant submitted substantial evidence of work that was not acknowledged in the OER and affidavits from other officers who highly praised his work during the evaluation period. The applicant also alleged that the members of his rating chain had been changed just three weeks before the end of the evaluation period.

In his advisory opinion for the case, the JAG recommended that the Board grant relief by replacing the disputed OER with one prepared “for continuity purposes only.” The JAG stated that under Article 10.A.3.a.2. of the Personnel Manual, the officer who served as the applicant’s reporting officer for all but the last three weeks of the evaluation period was required to prepare an OER for the applicant before leaving the unit but failed to do so. The JAG submitted affidavits showing that the departing reporting officer knew that he should have submitted an OER for the applicant and intended to do so but was thwarted by command, who required him to submit only comments for the OER. The departing reporting officer indicated that if he had prepared the OER as required by regulation, it would have been a significantly better.

The Board found that the applicant’s record had been prejudiced by the violation of Article 10.A.3.a.2. of the Personnel Manual “in that marks and comments throughout the disputed



From September 26, 1995, through June 9, 1997, the applicant served as the commanding officer (CO) of a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He received primarily marks of 6 in the various performance categories and marks in the fifth spot on the comparison scale, which denotes a “distinguished performer” ready for challenging, leadership assignments. On August 1, 1996, he was promoted to lieutenant commander.

From June 10, 1997, through April 30, 2000, the applicant served as the CO of a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. He received almost all 6s in the performance categories and marks in the fifth spot on the comparison scale.

From May 1, 2000, through March 31, 2003, the applicant served as the xxxxxxxxxxxx xxxxxxxxxxxx, supervising three officers and fourteen enlisted members. On his first annual OER in this billet, the applicant received nine marks of 5, nine marks of 6, and a mark in the fifth spot on the comparison scale. On September 1, 2001, he was promoted to commander. On his second annual OER in this billet and his first as a commander, the applicant received nine marks of 4, eight marks of 5, one mark of 6, and a mark in the fourth spot on the comparison scale, which denotes a “good performer” ready for challenging assignments. The applicant’s third and last OER in this billet was the OER disputed in Docket No. 2006-085, which the Board has already removed from his record.

From April 1, 2003, through February 29, 2004, the applicant served as a xxxxxxxxxxxx xxxxxxxxxxxx. On his OER for this service, he received primarily marks of 4 and 5 and a mark in the fourth spot on the comparison scale. He was “recommended for promotion with peers.”

From March 1, 2003, through March 31, 2006, the applicant was detailed to the [REDACTED]

[REDACTED] In January 2006, he became the xxxxxxxxxxxx xxxxxxxxxxxx. On his first OER in this billet, he received nine marks of 5, seven marks of 6, two marks of 7, and a mark in the fifth spot on the comparison scale. He was “recommended for promotion with peers.” On his second OER, he received six marks of 5, ten marks of 6, two marks of 7, and a mark in the fifth spot on the comparison scale. He was “[h]ighly recommended for promotion to O-6 where his proven inter-departmental relationships and skill-sets can be leveraged.” On his third OER, the applicant received thirteen marks of 6, five marks of 7, and a mark in the sixth spot on the comparison scale, which denotes an officer who is “strongly recommended for accelerated promotion.” The reviewer added a comment page in which he wrote that the applicant had “distinguished himself as a leader in the [REDACTED] and has my highest recommendation for promotion to O-6. He is well qualified for senior command and most highly recommended for command afloat or ashore.”

The applicant failed of selection for promotion to captain (O-6) in July 2006 while the disputed OER, which the Board ordered removed in the Final Decision for Docket No. 2006-085, was still in his record. The applicant received two more excellent OERs but failed of selection again in July 2007 after his record had been corrected pursuant to the Board’s Order in Docket No. 2006-085.

## 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 submissions, and applicable law:

1. The Board has jurisdiction over this matter under 10 U.S.C. § 1552 and 33 C.F.R. § 52.73.

2. The JAG asked the Board to amend its Order to remove from the applicant's record his failure of selection for promotion in July 2006 before the PY 2007 captain selection board. The applicant's disputed OER, which was removed by order of this Board in January 2007, was still in his record in July 2006. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), to determine if the applicant is entitled to the removal of his failure of selection, the Board must answer the following two questions: "First, was the [applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [he] would have been [selected for promotion in 2006] in any event?"

3. The Board finds that the applicant's record was prejudiced by the presence of the disputed OER, which contained very low marks in comparison with his other OERs. Moreover, in the Final Decision in BCMR Docket No. 2006-085, the Board made the following findings:

4. The Board must also determine, however, whether the clear violation of Article 10.A.3.a.2.b. was prejudicial to the applicant's record—i.e., whether the change in the reporting officer caused the applicant to receive a worse OER than he otherwise would have—and, if so, whether the entire OER must be removed or just that portion prepared by the reporting officer, which is actually the best part of the disputed OER. In BCMR Docket No. 151-87, it was held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material."

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8. Therefore, the Board finds that the violation of Article 10.A.2.3.2.b. was prejudicial to the applicant's record in that marks and comments throughout the disputed OER would likely have been better had the correct officer exercised his full authority as the applicant's reporting officer. Moreover, as stated in BCMR Docket No. 151-87, the entire OER appears to have been "infected" by the error and it is "impossible or impractical to sever the incorrect/unjust material from the appropriate material."

4. To determine whether it is "unlikely that [the applicant] would have been [selected for promotion in July 2006] in any event,"<sup>1</sup> the Board must consider the remainder of the applicant's performance record before the selection board to determine whether he could have been a competitive candidate for selection.<sup>2</sup> However, the Court of Federal Claims has held that when an officer shows that his record was prejudiced before a selection board by error, "the end-

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<sup>1</sup> *Engels* at 176.

<sup>2</sup> *But see Quinton v. United States*, 64 Fed. Cl. 118, 126 (2005) (holding that "[i]t is not enough, in determining that plaintiff was not likely to have been promoted, to comment only on his record. Without comparing an officer to the other contestants, no reasonable mind can say how any particular individual would fare in a competition in which not everyone can prevail").

burden of persuasion falls to the Government to show harmlessness—that ... there was no substantial nexus or connection” between the prejudicial error and the failure of selection.<sup>3</sup> In requesting the technical amendment, the Coast Guard apparently concedes that there was a nexus between the erroneous OER and the applicant’s failure of selection in 2006.

5. Under Article 14.A.3.b. of the Personnel Manual, the basic criteria that selection boards must consider in making selections for promotion include an officer’s performance evaluations, professionalism, leadership, and education, as well as any negative entries, such as documentation of alcohol incidents or civil arrests. Article 14.A.4.d. states that a captain selection board should pay most attention to the “[s]even years of immediate previous service or all service in present grade, whichever is greater.” The applicant’s record includes many Commendation Medals and Achievement Medals and no alcohol incidents or other negative entries. During the seven years prior to his failure of selection in 2006, the applicant received very high OER marks while in command of a vessel and while serving on detail to DHS. Although he received a couple of mediocre OERs during those seven years, he was strongly recommended for accelerated promotion and for command ashore and afloat on his last two OERs before the selection board met.

6. The Board notes that the applicant failed of selection in July 2007 even after the disputed OER was removed, but this failure does not prove that he would have failed in 2006 had the disputed OER not been in his record because each selection board is composed of different officers; each pool of candidates for selection is different; and each pool has a different opportunity for selection.<sup>4</sup> In light of the excellence of most of the applicant’s performance record—especially his OERs while in command and his most recent OERs<sup>5</sup>—the Board finds that it is not unlikely that the applicant would have been selected for promotion in July 2006 had the disputed OER not been in his record before the selection board. Moreover, under 14 U.S.C. § 285, Congress provided that each commander should have two chances to be considered for promotion to captain, and justice requires that an officer’s record should be substantially correct when it is reviewed by a selection board.<sup>6</sup> Therefore, the applicant’s failure of selection for promotion in July 2006 before the PY 2007 CAPT selection board should be removed from his record.

7. In accordance with the JAG’s request and the above findings, the Board should amend its Order in Docket No. 2006-085 to include removal of the applicant’s failure of selection for promotion by the PY 2007 CAPT selection board so that he will have another opportunity to be selected by the next CAPT selection board.

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<sup>3</sup> *Quinton* at 125, citing *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982).

<sup>4</sup> The “opportunity for selection” for a particular selection board is calculated as the number of promotions the board is allowed to make divided by the number of officers “in the zone” for promotion.

<sup>5</sup> *Godwin v. United States*, 338 F.3d 1374, 1381 (Fed. Cir. 2003) (holding that “among all prior OERs, the most recent assessment of the officer’s performance is particularly informative as to the officer’s current capabilities and future potential”).

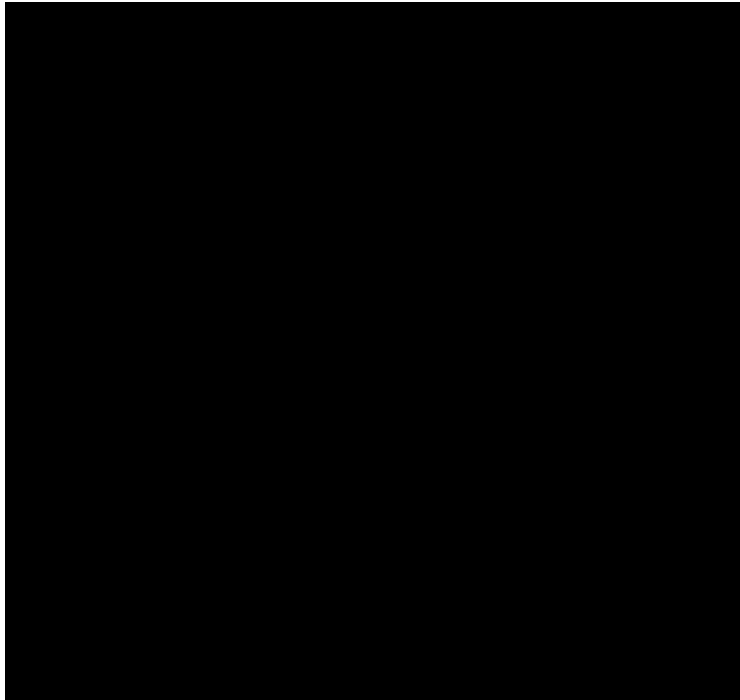
<sup>6</sup> *Sanders v. United States*, 219 Ct. Cl. 285, 302 (1979) (holding that “a substantially complete and fair record is a necessary requirement of proper consideration by a selection board”).

**ORDER**

The Board's Order in Docket No. 2006-085 is amended to require the following additional correction of the military record of xxxxxxxxxxxxxxxxxxxxxxxxxxxx:

The Coast Guard shall remove from his record his failure of selection for promotion by the PY 2007 CAPT selection board, which convened in July 2006.

October 4, 2007  
Date



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BOARD FOR CORRECTION OF MILITARY RECORDS**

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**BCMR Docket No. 2006-085**

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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 April 7, 2006, upon receipt of the applicant's completed application.

This final decision, dated December 14, 2006, 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 correct his record by removing his officer evaluation report (OER) for the period April 1, 200x, to March 31, 200y, while he was serving as the xxxxxx of the Coast Guard's xxxxxxxxxxxxxx at one of the Coast Guard's ██████████. The disputed OER contains five marks of 3 (on a scale of 1 to 7, with 7 being best), ten marks of 4, and three marks of 5 in the various performance categories and a mark in the fourth spot on the comparison scale. While serving in the same billet, the applicant had previously received OERs with marks of 4, 5, and 6 from a prior supervisor and reporting officer. The disputed OER contains the following written comments by the Chief of the ██████████ center's Operations ██████████ Branch, CDR X, who served as the applicant's supervisor, to support the low marks of 3 he assigned in the performance categories "Results/Effectiveness," "Adaptability," "Looking Out for Others," "Teamwork," and "Workplace Climate":

- 1) Block 3: "Resources sometimes not used to full potential ... senior staff mbrs often not clued in on plan. Needed information not always presented to supervisor/followers. Many class critiques not forwarded, had to be searched for."

- 2) Block 3: "Sometimes slow to take action on important personnel issues ... crew office moves ... MCPO recall from retirement ... frocking of petty officer ... required supervisor assistance/intervention. With O-x filling O-y billet for entire marking period, performance/growth of [REDACTED] and its stature in [REDACTED] community less than expected. Opportunities for professional growth outside of xxxxxx assignment existed but were not seized."
- 3) Block 4: "At times does not listen appropriately to others ... tends to dismiss others' opinions."
- 4) Block 5: "Occasionally lax in attending to needs of staff. With questions/encouragement from supervisor will take appropriate actions. Inability to think/act beyond scope of [REDACTED] sometimes limits effectiveness. When motivated, produces good product ..."
- 5) Block 5: "After supervisor became involved, [he] strongly supported recall of mbr reaching mandatory retirement ..."
- 6) Block 5: "Teamwork not usually visible, often operations and [REDACTED] seem fragmented. Supervisor's perception is that team members are usually awaiting decision/action from [him]. Workplace climate not always conducive to professional growth ... staff usually waits for direction ... some apparent stifled growth opportunities. [REDACTED] operation requires more attention from supervisor than expected from O-x xxxxxx. Often feedback from [REDACTED] pending correspondence must be sought out/searched for. Again, when motivated will reach beyond xxxxxx responsibilities ..."

The commanding officer of the [REDACTED] CAPT X, who served as the reporting officer (RO2) for the OER, wrote the following comments in his part of the OER:

- 7) Block 7: "Do not concur w/ Supervisor marks [of 3] in: Results/Effectiveness; Adaptability; Looking Out for Others; Teamwork; and Workplace Climate. I would assign a mark of 4 in all of those qualities. [The applicant] has produced mostly acceptable results but not what the CG expects from an O-x filling an O-y billet; could have done much more. Some improvement has been noted in the last few months but there is still room for professional growth. [He] has the skills and talents to do the job. He only needs to bring them to bear to succeed."
- 8) Block 8: "Produces good work but appears content with O-x level of responsibilities." This block also includes a summary of the applicant's accomplishments not included in Block 3, where accomplishments are usually listed by the supervisor.



- 9) Block 10: "A dedicated officer contributing to the [REDACTED] mission & CGHQ Program goals but not reaching own full potential. Missed opportunity to lead [REDACTED] and the associated [REDACTED] & Standardization Teams to even higher levels of performance. While [the applicant] fully accomplished the normal daily work of this O-x position, he is capable of much more as evidenced by previous command & shipboard experience. Extensive technical knowledge of challenges facing [REDACTED] program makes [him] well suited for positions of responsibility within the [REDACTED] program such as District, Area, or Headquarters [REDACTED] staff."

The applicant stated that in March 200y, at the very end of the evaluation period, his rating chain was suddenly changed so that the officer who had been his designated reporting officer (RO1) was removed from his rating chain. His new reporting officer, RO2, had had no opportunity to observe his performance. As a result, the applicant stated, RO2 relied on negative comments made by his supervisor, CDR X, when preparing the OER. He stated that at a meeting with his supervisor and RO1, RO2 had admitted to relying on the supervisor's assessment and said he would change some of the marks and comments in the disputed OER in response to what he had learned from RO1 during the meeting. In support of this allegation, the applicant submitted a copy of a memorandum dated March 10, 200y, which announced a reconfiguration of the rating chains at the [REDACTED]

The applicant also alleged that his new supervisor, who arrived during the middle of the evaluation period, did not appear to take into account the work he accomplished prior to the supervisor's arrival. Moreover, the new supervisor never mentioned to him any of the concerns discussed in the disputed OER and never expressed dissatisfaction with his performance during the evaluation period. The applicant stated that the supervisor himself was preoccupied with two other [REDACTED] at the [REDACTED] [REDACTED] and was minimally involved in the [REDACTED]. The applicant stated that he reported on the status of various [REDACTED] sessions, events, and projects at weekly xxxxxx's meetings with the supervisor and accepted the supervisor's lack of inquiry or involvement in the [REDACTED] as a sign that he was satisfied with the applicant's work as a xxxxxx.

The applicant further alleged that there "is a significant disparity between the accomplishments of the [REDACTED] expressed in my evaluation and the evaluation of [LCDR Y], the Assistant Xxxxxx." The applicant alleged that his leadership and guidance contributed significantly to LCDR Y's success and to the accomplishments of the [REDACTED]'s staff described in LCDR Y's OER for the same period. The applicant stated that in LCDR Y's OER, the applicant's supervisor (who served as LCDR Y's reporting officer) gave LCDR Y the credit for "transitioning the [REDACTED] to the new enlisted marking system" where as it was the applicant himself who managed the transition. In fact, to streamline the process, enlisted evaluations "were routed directly to [the applicant] and were no longer required to go through the Assistant Xxxxxx. This type of discrepancy is present in many of the inaccurate statements made by the supervisor in my

OER." The applicant submitted a copy of LCDR Y's OER. In it, the applicant's supervisor described LCDR Y as follows:

Dynamic leader: bolstered [REDACTED] during tenure of weak xxxxxx. Provided crew with focus and direction in potential leadership vacuum. Improved [REDACTED] & CG through active and enthusiastic leading participation in major initiatives including ... . Provided critical recommendations based on sound, logical thinking & rock solid judgment. Impressive command presence; the "go to" officer. ...

Outstanding leadership & management skills; can always be counted on for mission success: Tactfully and diplomatically kept [REDACTED] running smoothly while serving as Asst. Xxxxxx. Personal efforts kept [REDACTED] and crew on track despite having a weak supervisor. Has my strongest possible recommendation for command afloat or ashore ... . Highly recommended for promotion to O-y ahead of peers.

Regarding another inaccuracy in his own OER, the applicant stated that he endorsed and forwarded a first class petty officer's request to be frocked as a chief petty officer so that he could attend a Chief Petty Officers' Academy the same day he received the request. However, his supervisor questioned whether they should frock someone just so the member could [REDACTED]. After the applicant verified the requirement with the Academy and the Personnel Command, he again forwarded the request, which was approved by the commanding officer of the [REDACTED] despite his supervisor's opposition.

The applicant described several significant projects underway at the [REDACTED] [REDACTED] during the evaluation period that the supervisor apparently omitted from the OER. The applicant also submitted nine statements from officers who worked with him during the evaluation period:

- 1) CDR A, who was an [REDACTED] program manager at Headquarters, described at length some of the projects and problems that the applicant successfully handled during the evaluation period.
- 2) CDR B, an [REDACTED] signal manager at Headquarters who served as the liaison to the [REDACTED] [REDACTED] wrote about some significant changes taking place in the [REDACTED] program during the evaluation period and stated that "[REDACTED] and [the applicant] were responsible for developing and fielding the [REDACTED] that was going to be required at the unit level ... . [REDACTED] was charged with developing a new [REDACTED] integrating the new program into program courses at all levels, [and] upgrading the current facilities to allow for the new [REDACTED] workload."
- 3) CWO A, an [REDACTED] technical advisor at the [REDACTED] [REDACTED] stated that during the evaluation period the applicant "was fully involved in the stand-up of the ... Standardization Team, the development of the ... [REDACTED] Team Course, and the ... Supervisor Course. [He] always displayed a high interest in the [REDACTED] being given to [REDACTED] units and participated on deck during visits to units. ... He successfully

worked to upgrade and update the courseware and transition to the ... format. Realizing a potential leadership gap with the exportable sections, he established a new section within [REDACTED] [REDACTED] to supervise the ... Teams. ... [The applicant] supported the [REDACTED] community outside of [REDACTED] [REDACTED] through the Technical Advisor's inclusion to the ... Team that resulted in better support for [REDACTED] weight handling and rigger safety. Additionally, he hosted a meeting of the Standardization Team Chiefs and Headquarters program managers at [REDACTED] [REDACTED] to review the ... Manual ... [The applicant] encouraged and supported professional growth of [REDACTED] personnel. ..." CWO A also cited several examples of how the applicant had assisted subordinates in their professional growth.

- 4) CWO B stated that during the evaluation period, he worked at the [REDACTED] [REDACTED] "standing up and running the ... Team under the direction of [the applicant]." CWO B described some of the work the applicant accomplished and stated that the applicant's support was "critical" to the success of the Standardization Program and to CWO B's own promotion from chief petty officer to chief warrant officer.
- 5) Mr. A, a trainer and [REDACTED] branch chief at the [REDACTED] stated that during the evaluation period, he worked with the applicant to review and update the [REDACTED] [REDACTED] outlines. Mr. A stated that the applicant directed each of his course managers to update their curricula and then reviewed them all. The applicant also worked with the [REDACTED] staff to "hammer out" a review process for formatting and reviewing all curricula. Mr. A noted that the applicant also developed a [REDACTED] for the [REDACTED] [REDACTED] which was well received.
- 6) Mr. B, a project manager at the [REDACTED] center, praised the applicant's dedication in ensuring the development of "accurate and valid [REDACTED] [REDACTED] outlines."
- 7) CDR C, the facilities engineer at the [REDACTED] stated that the applicant did not delay the move of the [REDACTED] [REDACTED] in any way. He stated that "all of the moves did not occur according to the original schedule for a number of construction and logistics reasons, but I can't think of any which were impacted by a customer (such as [the applicant] or his [REDACTED])
- 8) MCPO A, a section chief at the [REDACTED] [REDACTED] during the evaluation period, described how the applicant positively endorsed and supported his request for a two-year waiver of the 30-year High Year Tenure retirement rule and then positively endorsed and supported his request to be recalled to active duty and intervened to have a policy reviewed by the Personnel Command to ensure that MCPO A would have no break in service upon recall.

- 9) CDR D, a branch chief at the [REDACTED] stated that during the evaluation period the applicant spearheaded the development of a comprehensive indoctrination [REDACTED] course for new xxxxxs. The applicant led numerous meetings over a four-month period and “effectively tapped the talents” of the team members to develop course objectives and a course schedule and to identify appropriate instructors.

In addition, the applicant submitted a copy of a declaration signed by RO2, who wrote the following in pertinent part:

After reviewing the statements of personnel directly involved with [the applicant’s] performance during the marking period, I do not feel that the marks and comments in [his] OER for the above period accurately reflect his accomplishments during the period. The statements provide a substantially different picture than the information I was provided by [his] supervisor.

During the period, I do not believe [the applicant’s] supervisor adequately conveyed the programmatic issues that [the applicant] was actively working to resolve. As a result, I was not made aware of [his] efforts to successfully resolve many of these issues. In addition, the supervisor failed to inform me of [the applicant’s] efforts to standardize [REDACTED] development within the [REDACTED] Division.

Likewise, I do not believe the supervisor provided an accurate portrayal of [the applicant’s] effort to support the [REDACTED] staff. The statements provided by the personnel who worked for [him] show that he encouraged and supported their professional growth and their personal needs. This again is inconsistent with the information provided in the OER.

## IEWS OF THE COAST GUARD

On August 8, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case by replacing the disputed OER with one prepared “for continuity purposes only.” The JAG based his recommendation on a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC), which the JAG adopted.

CGPC stated that under Article 10.A.3.a.2. of the Personnel Manual,<sup>1</sup> if an officer has not received an OER within 182 days when his reporting officer departs or changes,

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<sup>1</sup> Article 10.A.3.a.2. of the Personnel Manual, titled “Detachment or change of the Reporting Officer,” states the following:

- a. OERs for officers on a biennial submission schedule are required if more than 12 months have elapsed since the ending date of the last regular OER or the date reported present unit, whichever is later.
- b. OERs for officers on an annual submission schedule are required if more than six months (i.e., 182 days) have elapsed since the ending date of the last regular OER or the date reported present unit, whichever is later.
- c. OERs for officers on a semiannual submission schedule are required if more than three months (i.e., 92 days) have elapsed since the ending date of the last regular OER.
- d. OER submission is optional in other situations.

an OER must be prepared upon the departure or change of the reporting officer. Therefore, when the applicant's rating chain was changed on March 10, 200y, three weeks from the end of the evaluation period, the departing reporting officer should have prepared an OER for him, in which case no OER would have been prepared on March 31, 200y, by the new rating chain. CGPC stated that "[a]ll comments and marks within the disputed OER cannot be viewed with merit because the rightful Reporting Officer did not have the opportunity to exercise his legitimate rating chain responsibilities. Therefore the entire OER should be expunged and replaced with a Continuity Only OER."

CGPC submitted three declarations signed by members of the applicant's rating chain. RO1, who served as the applicant's reporting officer until March 9, 200y, stated in a declaration that when the memorandum was issued on March 10, 200y, he

specifically told the CO and XO that I should sign the OER ending on 200y/03/31 as reporting officer since it was so close to the end of the period or I should do a change of reporting officer OER effective 200y/03/09. They replied that it wasn't necessary since I would be reviewing the OER for content purposes while it was enroute to the CO. ... [After meeting with RO1 and the supervisor, RO2] retrieved the original OER from [Headquarters] and had me draft new comments for the Reporting Officer section of the OER which I did that day and forwarded to him. He basically signed what I prepared and sent it to [Headquarters] for review.

I disagree with [RO2's] statement that he was unaware of [the applicant's] efforts at the [REDACTED]. Everything addressed by [the applicant] in his statement was included in the OER package he submitted to [the supervisor]. [The supervisor] disagreed with [the applicant's] level of involvement or success but the documentation from [the applicant] was in the OER package. On a number of occasions both before and during the OER period under consideration, [RO2] would ask me what [the applicant] was doing at the [REDACTED]. He would comment that he never hears anything about the [REDACTED] or what is going on there. I would reply that the [REDACTED] was doing fine and the program manager ... never contacted me with concerns. (I would definitely get calls from the program manager of a [REDACTED] if they either "heard" something or did not like something that took place at a [REDACTED]. On one occasion during the fall of 200x, [RO2] contacted [the program manager] to make sure he was OK with how things were going at the [REDACTED]. I remember [RO2] saying the program was satisfied with the [REDACTED] performance.

My personal observation is that [the applicant] was inwardly focused as the [REDACTED] Xxxxxx and did not actively "market" himself outside of the [REDACTED]. He supported his staff when it was appropriate and let the staff get the credit for what was done at the [REDACTED]. This type of personality is a direct opposite of both [the supervisor and RO2] who were outwardly focused in their roles.

The supervisor signed a declaration in which he stated that he could not address the applicant's more specific allegations of error because he only has vague memories of the events three years after the fact. He alleged that after he drafted the disputed OER, he discussed it with RO1, the departing reporting officer, and that RO1 shared his reasoning and his opinions. He stated that when he gave the OER to the applicant he tried to answer his questions but "did not provide satisfactory explanations ... and he rightfully sought them further up the chain of command." Later, RO1 told him that RO2

wanted him to reconsider the marks and comments he had made in the OER but he refused because he had already "given it a tremendous amount of thought and consideration and was comfortable that it was an accurate reflection of [the applicant's] performance as I saw it." The supervisor alleged that in the summer of 200y, after the end of the evaluation period, RO2 relieved the applicant of his duties based upon a joint recommendation from himself and RO1. The supervisor admitted that during the evaluation he "did not provide [the applicant] much task direction and little to no performance counseling or feedback until he was presented with the OER in question." He stated that the other four commissioned xxxxxs kept him "well informed of their successes and challenges. They all sought out my opinion on how they were progressing. All four have since [been] promoted to O-5. In my experience silence from the boss does not indicate success and I always seek out my boss's feedback as to whether I am on the right path or not. ... If [the applicant] had taken the time to inquire, I would have made the time to counsel him. ... I stand by the evaluation I gave him."

The captain who served as the reviewer of the disputed OER stated in a declaration that as Chief of the Office of [REDACTED] and Performance Consulting at Headquarters, he had no opportunity to observe the applicant's performance.

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

On August 28, 2006, the applicant responded to the Coast Guard's recommendation by saying that he concurred with it.

## FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. Article 10.A.1.b.1. of the Personnel Manual provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." The applicant alleged that the disputed OER is erroneous and unjust and asked the Board to remove it from his record. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by a "misstatement of significant hard fact," factors that "had no business being in the rating process," or a "clear and prejudicial violation of a statute or regulation."<sup>2</sup> The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.<sup>3</sup> Absent evidence to the contrary, the Board presumes that the OER was prepared "correctly, lawfully, and in good faith."<sup>4</sup>

3. The Coast Guard has admitted that upon the alteration of the applicant's rating chain on March 10, 200y, an OER should have been prepared with RO1 as the reporting officer instead of RO2. The command's failure to do so constituted a clear violation of Article 10.A.3.a.2.b. of the Personnel Manual since RO1 was the designated reporting officer throughout all but the last few days of the evaluation period and more than 182 days had passed since the end date of the applicant's previous annual OER. The Board notes that although the command was entitled to change the applicant's rating chain, they were required to abide by the provisions of the Personnel Manual when doing so.

4. The Board must also determine, however, whether the clear violation of Article 10.A.3.a.2.b. was prejudicial to the applicant's record—i.e., whether the change in the reporting officer caused the applicant to receive a worse OER than he otherwise would have—and, if so, whether the entire OER must be removed or just that portion prepared by the reporting officer, which is actually the best part of the disputed OER. In BCMR Docket No. 151-87, it was held that "an OER will not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect

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<sup>2</sup> *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

<sup>3</sup> 33 C.F.R. § 52.24(b).

<sup>4</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).

or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.”

5. Under Article 10.A.2.e.2.b., the responsibilities of the reporting officer include completing the final part of an OER based on direct observations of the reported-on officer and reliable reports provided by the supervisor and others. The reporting officer’s part of the OER includes block 7, in which the reporting officer comments on the supervisor’s evaluation of the officer; block 8, in which the reporting officer assigns numerical marks for the categories “Initiative,” “Judgment,” “Responsibility,” “Professional Presence,” and “Health and Well-being” and provides written comments to support those marks; block 9, the comparison scale, in which the reporting officer compares the officer to all others of the same rank whom the reporting officer has known; and block 10, in which he writes comments about the reported-on officer’s potential to assume greater leadership roles and responsibilities and makes recommendations about promotion, if any. The reporting officer also “[e]nsures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. 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.”

6. According to the declaration of the outgoing reporting officer, RO1, he actually prepared the reporting officer’s part of the disputed OER: “[After meeting with RO1 and the supervisor, RO2] retrieved the original OER from [Headquarters] and had me draft new comments for the Reporting Officer section of the OER which I did that day and forwarded to him. He basically signed what I prepared and sent it to [Headquarters] for review.” However, it is clear that RO1 prepared the reporting officer’s part of the OER not for his own signature but for that of RO2 and knew, after meeting with the supervisor and RO2, what marks and comments RO2, his commanding officer, wanted in the OER. RO1’s declaration also shows that he knew that RO2’s opinion of the applicant’s performance was not as favorable as his own and attributed that lower opinion at least in part to personality differences between the applicant and RO2. Moreover, RO2 himself has stated in a declaration on behalf of the applicant that he does not believe he received accurate information about the applicant’s performance before he signed the disputed OER. Therefore, the Board is persuaded by a preponderance of the evidence that had RO1 prepared his part of the OER for his own signature, the marks and comments would have been better.

7. In his declaration for the advisory opinion, the supervisor stood by his part of the disputed OER and stated that he was asked to reconsider his marks and comments but refused to do so. Article 10.A.2.e.2.b. does not permit a reporting officer to direct a supervisor to change a specific comment or mark, but it does state that a reporting officer “shall return a report for correction or reconsideration, if the Supervi-



sor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments." RO1 observed the applicant's performance throughout the evaluation period and clearly did not agree with the supervisor's evaluation. The record includes substantial evidence showing that the applicant's performance was significantly better than indicated by the supervisor's marks and comments in the disputed OER. Had RO1 not been removed from the rating chain, he might well have exercised his authority under Article 10.A.2.e.2.b. to insist that the supervisor's part of the evaluation more accurately reflect the applicant's performance. Moreover, had RO1 not been removed from the rating chain, the supervisor might have been more inclined to revise his marks and comments to more closely reflect RO1's opinions. Therefore and in light of all the circumstances of this case, the Board is persuaded that, had RO1 been allowed to exercise his authority and perform his duties as the applicant's reporting officer, the marks and comments in the supervisor's section of the disputed OER might well have been better.

8. Therefore, the Board finds that the violation of Article 10.A.2.3.2.b. was prejudicial to the applicant's record in that marks and comments throughout the disputed OER would likely have been better had the correct officer exercised his full authority as the applicant's reporting officer. Moreover, as stated in BCMR Docket No. 151-87, the entire OER appears to have been "infected" by the error and it is "impossible or impractical to sever the incorrect/unjust material from the appropriate material."

9. Accordingly, the applicant's record should be corrected by removing the disputed OER and replacing it with one prepared "for continuity purposes only."

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

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted as follows:

His officer evaluation report for the period April 1, 200x, through March 31, 200y, shall be removed from his record and replaced with one prepared "for continuity purposes only."

