

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-140

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX**

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application on June 8, 2007, upon receipt of the application, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 13, 2008, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by removing an officer evaluation report (OER) for the period from October 1, 2001 to June 15, 2002 (disputed OER), from his record and by replacing it with a report prepared for continuity purposes only. The applicant further requested that, if he is selected for promotion by the 2007 lieutenant commander (LCDR) selection board (which he was), his promotion to that grade be backdated to June 2006, with back pay and allowances.

The Disputed OER

The OER covers a period when the applicant was assigned as a Coast Guard Command Center Duty Officer. The evaluated performance on the disputed OER consists of three parts: the supervisor's portion, the reporting officer's portion, and the reviewing officer's portion. In this case, the supervisor and reporting officer were the same person, which is permissible under the Coast Guard Personnel Manual. Under performance of duties in the supervisor's portion of the OER, the applicant received marks of 5 for planning and preparedness, using resources, results/effectiveness, and professional competence.¹ He received a mark of 4 in adaptability. In the comments block the reporting officer wrote:

¹ Marks on an OER form are from a low of 1 to a high of 7. A 4 is considered to be an average mark. Article 10.A.4.c.4.g. of the Personnel Manual.

Professionally executed all Presidential Decision Direct 27 (PD-27) conferences to ensure interagency concurrence; positive coordination between CG, DOS, Mexican and Guatemalan governments on highly sensitive and intricate migrant case resulted in return of 250 Ecuadorian migrants. Coordinated rescue on downed National Guard pilot near Atlantic City, rescuing pilot and strengthening interagency ties. Submitted critical passdown information to ameliorate watch transition. Proper Management of highly visible M/V MACANUDO force majeure case enable senior leaders to make timely and informed decisions. Personally documented over 100 reports of oil, chemical, hazardous material spills and terrorists incidents resulting in hundreds of notifications to Federal, Stated, and local agencies that support the National Response Plan and Homeland Security. Made extensive use of technological and local resources, efficiently utilizing CG districts to obtain current case information. Had difficulty adapting and incorporating changing watchstanding duties/policies. Efficiently handled several time critical death imminent cases, precise execution benefited dependents. Assisted in processing of over 2000 migrant interdictions, thousands of pounds of contraband, five marine safety cases, and several in-depth suspicious activity/terrorism threats to the maritime arena.

In the communication skills section of the OER, the reporting officer gave the applicant marks of 5 in speaking and listening and in writing. In support of these marks, the supervisor wrote:

Actively contributed to the precise and effective summaries of operational events through case log documentation and weekly operational highlights. Accurately documented 6 marine casualties for SECDOT through clear, concise SECALERTS. Delivered 5 formal briefings for C-C, G-M and other senior officials. Wrote 43 FOIA request response letters, accurately portraying the NRS's positions on each. Takes appropriate time to prepare for oral briefs. Produced accurate NRC reports and verbally passed report information to FOSCs.

In the leadership skills section of the OER, the reporting officer gave the applicant a mark of 7 in looking out for others, a mark of 6 in workplace climate, and marks of 5 in developing others, directing others, teamwork, and evaluations. In support of the marks in this section, the supervisor wrote:

As CG Command Center Duty Officer (CCDO), direct activities of divers 11 member watch team. Through maturation process and assistance of E-8 Assistant Duty Officer (ADO), watch team adequately processed a myriad of operational cases. Developed good working rapport with watch section. Effectively directed assigned tasks to District Command Centers to obtain information providing clear input . . . accurate and timely briefings to senior officials. Demonstrated genuine concern for military family while quickly and efficiently processing expedited review of CG member; diplomatically handled details of the case. Own OER submission submitted on time and extensively documented. Volunteered and

assisted fellow officer in cleaning out house after it was damaged by fire. Volunteered in the clean up efforts in the aftermath of local tornado damage. Extensively worked with a petty officer in submitting package of OCS. Worked closely with FBI liaison officer to ensure that the NRC fully supported the FBI's reporting requirements in the wake of the terrorist attacks. Anticipating multiple FOIA requests in the wake of Sept. 11th, developed system for all NRC watchstanders to compile a list of all error related calls . . . easier cross-referencing for specific FOIA requests.

The reporting officer wrote in block 7 of the OER that the applicant demonstrated excellent initiative by beginning his pursuit of a Master's Degree with the Naval War College to enhance his education in conjunction with achieving both personal and professional skills. The reporting officer stated that the applicant was an intelligent officer who absorbs new practices/procedures quickly. The reporting officer wrote that "[the applicant] does need to improve his tact . . . and how he portrays himself to senior officers."

In the personal and professional qualities section of the OER, the reporting officer gave the applicant a mark of 6 in health and well being, marks of 5 in initiative, responsibility, and professional presence, and a mark of 4 in judgment. In support of the marks, the reporting officer wrote the following:

Adequately handled potential terrorists threats, promptly recognizing implications upon U.S. and correctly involved other agencies . . . quick reaction ensured required law enforcement agencies began the necessary threat assessment process. Exercise adequate judgment in analyzing complex situations and in making well thought out decisions during stressful situations. Needs to improve in thinking outside the box and not just following written guidelines that minimally cover required response actions. Routinely processed dozens of law enforcement in the interdiction of over 2000 illegal migrants and over 80,000 pounds of contraband. Maintains trim, smart appearance with friendly demeanor. Projected positive CG image while entertaining senior foreign officials during Command Center tours. Exercises regularly and encourages others to participate. Grad school enrollment enhanced professional capabilities in warfare. Successfully prosecuted high profile request from CDC for Strike Team members to assist with anthrax cleanup of US Senate building. Worked with G-OPL to ensure several Cuban Flotillas were properly monitored and briefed at the national level.

On the comparison scale in block 9 where the reporting officer compared the applicant with all other LTs he has known throughout his career, he marked the applicant in the center block as "one of the many competent professionals who form the majority of this grade," which is the equivalent of mark of 4 on a scale of 1 to a high of 7.

In block 10, the reporting officer noted that the applicant had been given a new assignment in the Plans and Exercises Division in the Office of Command, Control and Preparedness. He recommended the applicant for promotion and indicated that he was a prime candidate for post-graduate school in a field of his choosing.

The reviewer authenticated the OER without comment. According to the military record, the applicant did not submit a reply to the disputed OER.

Applicant's Previous and Subsequent OERs

Applicant's previous OER

The applicant's previous OER to the one in question consisted of a different supervisor/reporting officer, but the same reviewer. This OER covered the period from February 1, 2001 to September 30, 2001, and was prepared upon detachment of the reporting officer.

In the performance of duties section, the applicant was given marks of 5 in planning and preparedness and professional competence and marks of 4 in using resources, results/effectiveness, and adaptability. The comments in the section were positive.

In the communications section of the previous OER, the applicant received a mark of 4 in speaking and listening and a mark of 5 in writing, with positive comments.

In the leadership skills section of the previous OER, the applicant received marks of 5 in looking out for others and developing others and marks of 4 in directing others, teamwork, workplace climate, and evaluations. The comments were complimentary.

In the personal and professional qualities of the previous OER, the applicant received marks of 5 in initiative and health and well being and marks of 4 in judgment, responsibility, and professional presence. The comments were positive.

In section 9 of the previous OER, the applicant was rated as a "good performer; give tough, challenging assignments." This rating is in the fourth block of seven on the comparison scale where the reporting officer compares the reported-on officer with others of the same grade whom he has known in his career. This reporting officer stated that the applicant had excelled in his duties as command center duty officer and recommended him for promotion with his peers.

Applicant's Subsequent OER

The applicant's subsequent OER evaluated his performance as a contingency preparedness planner. The OER covers a period from June 15, 2002, to June 27, 2003, and it is marked as a detachment of officer OER.

In the performance of duties section of this OER the applicant received marks of 5 in planning and preparedness, using resources, results/effectiveness, adaptability and professional competence. The comments were positive.

In the communications section of this OER, the applicant received marks of 5 in speaking and listening and writing, with positive comments.

In the leadership skills section of the OER, the applicant received marks of 6 in looking out for others category and workplace climate, and marks of 5 in developing others, directing others, teamwork, and evaluations. The comments for this section were complimentary.

In the personal and professional qualities section of this OER, the applicant received a mark of 6 in health and well-being, and marks of 5 in initiative, judgment, responsibility, and professional presence. The comments were positive.

In block 9 on the comparison scale, the applicant was rated as a “good performer; give tough, challenging” assignments.” This rating is in the fourth block of seven on the comparison scale where the reporting officer compares the reported-on officer with others of the same grade whom he has known in his career.

In block 10, the applicant was recommended for promotion, for staff assignments in intelligence, and for consideration for post graduate study.

APPLICANT’S ALLEGATIONS

The applicant alleged that the comments and marks on the disputed OER reflect an unfair, inaccurate, and subjective evaluation. The applicant stated that he was scheduled to transfer to an assignment in Baltimore in March 2002 that did not materialize. He stated that he had already bought a house in that area when he learned that he would not be getting the Baltimore assignment. He then requested to remain in his current assignment for a year. In order to do so, he had to obtain the approval of his supervisor, who was also the reporting officer for his rating chain. He requested the reporting officer’s permission to remain in his then current assignment, to which the supervisor replied “you are one of my best duty officers, of course we would love to have you extend for a year.”

The applicant stated that approximately three weeks after his conversation with the reporting officer about extending, the applicant’s wife saw the reporting officer with a young blonde woman during lunch. According to the applicant, his wife stated that the reporting officer was holding hands with the woman as they entered the restaurant. The applicant stated that his wife went over to the reporting officer’s table to say hello. The applicant stated that his wife knew the reporting officer’s family and that the woman with the reporting officer was not his wife.

The applicant stated that on that same day, the reporting officer told him that he had seen the applicant’s wife while he was having lunch with a male named KS. The applicant stated that when his wife phoned him that day on a recorded line that was accessible by the reporting officer, he asked her if she said hello to KS who had lunch with the reporting officer. He stated that his wife replied that she saw the reporting officer with a blonde woman and not KS. The applicant stated that the next day, he saw KS and asked him if he had had lunch with the reporting officer the previous day, to which KS replied that he did not have lunch with the reporting officer. The applicant attached a statement from his wife corroborating his allegations with respect to luncheon event.

The applicant alleged that approximately one week after that lunch, the reporting officer began to treat him very differently. He claimed that without any provocation, the reporting officer began publicly and privately yelling at him and repeatedly stating that the applicant was not able to do anything correctly. The applicant claimed that the reporting officer's abusive treatment toward him continued during the remainder of the period covered by the disputed OER.

The applicant alleged the disputed OER is inaccurate and the product of the reporting officer's fear that his relationship with the blonde would be exposed. The applicant stated that he was a superior performer during the period covered by the disputed OER and that the numerical marks are low and do not reflect his performance, except for the mark of 7 in block 5a – looking out for others. He argued that the comments are generic and lack the emphasis warranted by his superb performance during the rating period. He alleged that since the OER is tainted, it is necessary to remove the entire OER from his record.

The applicant stated that many of the comments that he proposed in his OER input were not included in the disputed OER, particularly those related to his efforts following the events of September 11. In this regard, he stated that he developed a plan to have fishing boats from Sheepshead Bay join the Auxiliary to help with the safety zone around New York Harbor. He stated that on September 13, 2001, he went to New York and arranged for five fishing vessels to temporarily join the auxiliary in order to augment the security zone around New York City. He stated that he volunteered several days of his personal time to help with the clean up at the World Trade Center site and to hand out food on Chelsea pier in Manhattan. According to the applicant, none of these accomplishments were included in the disputed OER.

The applicant alleged that the reporting officer's assignment as Aide to the Vice Commandant was shortened and that his orders to a position as Group Commander were cancelled because of the punitive letter of reprimand the reporting officer received for engaging in an adulterous relationship. The applicant stated that the reporting officer's history of infidelity was common knowledge among the staff at Coast Guard Headquarters, as well as his propensity to exact retribution on anyone who witnessed or knew of his inappropriate behavior and stood against it. In this regard, the applicant stated that a colleague, CDR D, let the reporting officer know that their relationship would be strictly professional when the reporting officer began flirting with her. The applicant submitted a statement from CDR D. In that statement, CDR D stated that when the reporting officer realized that she was aware of his behavior, the reporting officer exacted revenge on her through harsh treatment and a substandard OER.

As stated above, the applicant alleged that after his wife saw the reporting officer having lunch with a woman not his wife, the reporting officer began treating the applicant in an unfair and irrational manner. The applicant stated that on several occasions the reporting officer referred to him as a "stupid A—h---" and directed other derogatory comments toward him in public. The applicant stated that the reporting officer never gave him a reason for his anger toward him, although he asked him about it; the reporting officer never documented any alleged mistakes or performance issues.

The applicant alleged that there was no way in which he could please the reporting officer. According to the applicant, whether he accomplished a task as he had previously or whether he did so in a new way, the reporting officer would scream at him and say that the applicant should have known what the reporting officer wanted. The applicant claimed that before his wife saw the reporting officer at lunch with the blonde woman, the reporting officer had praised the applicant for the same actions about which he then-currently found fault.

The applicant stated that approximately three weeks after the luncheon incident, the reporting officer relieved him of his watchstanding duties and made him an assistant duty officer even though he had performed without incident as a duty officer and he had trained other officers for the job. The applicant stated that the reporting officer gave no reason for the decision to remove the applicant as a command center duty officer, except to say that “[the reporting officer] did not feel comfortable” with him, which the applicant attributed to the reporting officer’s guilty conscience.

The applicant stated that four days after being removed from duty as a command duty officer, the reporting officer telephoned him at home and told him that he had been relieved of duty. The reporting officer further stated that he had spoken with the reviewer and that the applicant would be transferred to another office within Headquarters, which the reporting officer described as a good thing because the applicant had just purchased a home and it would give him a “fresh start.” The applicant claimed that the next day, the reviewer told him that he was being transferred due to a “personality conflict” with the reporting officer.

The applicant stated that CDR D also experienced a pattern of unprofessional treatment at the hands of the reporting officer and had to dispute an allegedly inaccurate OER prepared by the reporting officer. The applicant also stated that CDR D served with him during the reporting period and found him to be a “superior performer.” The applicant stated that CDR D believes the disputed OER should be considered a retaliatory report based on her observations of the reporting officer’s unprofessional behavior toward the applicant. In support of these contentions, the applicant offered the following comments from CDR D’s sworn statement that he attached as an exhibit to his application:

Around this time, approximately June or July 2002 through his retirement, [the reporting officer] began to frequently criticize and demean me in front of the watch for various minor items, despite the fact that I was a fellow officer of equal rank and senior lineal number. He started to behave the same ways towards others, most notably [the applicant] who was probably criticized and belittled on a far more frequent basis than I was.

* * *

In my opinion, the OER in question is inaccurate and deficient. Furthermore, I believe that this OER was given in retribution as part of a pattern that [the reporting officer] demonstrated with several officers in the command center who exhibited leadership capabilities or independent good judgment in fulfilling their duties.

* * *

[The reporting officer] would throw “temper tantrums” for a lack of a better description toward a handful of watchstanders who were not his favorites. [The reporting officer’s] ill behavior appeared to occur on a hair trigger, depending on his mood at the time. [The reporting officer] would make up the rules as he went along, and if a member of the command violated those unknown rules, he would yell and scream at that person in front of others. I had worked with [the applicant] for two years prior to the summer of 2002 and saw nothing in his performance that supported the need for such treatment. [The applicant] was a superior performer the entire time I worked with him. Moreover, the public nature of these tirades was inexplicable.

* * *

[The reporting officer] would castigate [the applicant], me, and others in front of the National Response Office watch, consisting of contract civilians and E-4/E-5s as well as in front of the newly added Intelligence Watch staffed from the Intelligence Coordination Center (ICC) consisting of mainly O-1s and O-2s.

* * *

Sometime in 2002, despite the fact that we were low on watchstanders and that [the applicant] was an experienced watchstander doing an outstanding job, [the reporting officer] informed me that we would all have to begin picking up extra watches because he was transferring [the applicant] . . . I questioned the desirability of doing this, but [the reporting officer] told me that “he had to go,” offering no cogent explanation for the timing or circumstances of the transfer. Morale was at an all-time low. [The applicant] mentioned that he had to accept this transfer and was given no choice.

The applicant stated that LCDR H, a fellow officer assigned to another unit, swore that he was personally aware of the reporting officer’s propensity for getting personal retribution against officers under his supervision through inappropriate marks and comments in their OERs. The applicant quoted the following from LCDR H’s statement about the situation between the applicant and the reporting officer:

I know CDR D lobbied hard against [the reporting officer’s] plan to transfer [the applicant] from the CC. I am unaware of why [the applicant] was transferred but I can say that during the two-plus years I dealt with him on fisheries PD-27s, I was always extremely comfortable with his watchstanding abilities and held an extra layer of comfort when I knew he was on watch. He was, in my opinion, an excellent watchstander. I know that CDR D felt the same way and attempted to intervene on [the applicant’s behalf]. She offered to stand watch with him and take any corrective action she felt necessary, she also offered to counsel him and try to evoke some sort of performance improvement (although she, too, felt his

performance was excellent). When CDR D informed me that [the applicant] had been “sacked” by [the reporting officer], I was taken aback. I don’t want to second guess his administrative decision, but it would seem to me that transferring an extremely competent watchstander at a time of critical personnel shortages was probably not a prudent decision. The circumstances surrounding [the applicant’s] departure are purported to be based not on performance but on personal issues with [the reporting officer]. As I do not have personal knowledge of these issues, I will not advance conjecture. My perception, however, is that [the applicant] was “sacked” not because of any professional deficiencies, but because [the reporting officer] had issues.

The applicant also offered the following comments from Senior Chief T who had worked with the applicant and whose statement was attached as an exhibit to the applicant’s brief:

In approximately the last six months of my tour, both [the applicant] and I started to notice a change in the actions of [the reporting officer]. I witnessed several occasions where after calling the [reporting officer] as we were required, he would either become irritated at our call or call back and speak with [the applicant] unprofessionally about procedures or changes that neither one of us was aware of.

* * *

The final incident that occurred was at the beginning of one of our watches. As I came in to relieve the watch, [the applicant] informed me that [the reporting officer] wanted to see us in his office. Thinking that there was some new watch procedure to be passed, we both went in and were asked to close the door. At this point the [reporting officer] proceeded to immediately start yelling at both of us about how we ran our watch, including reading excerpts from a blank evaluation form and stating some of these were borderline UCMJ issues. We were both totally surprised and caught off guard by this since it was the first indication that there was any problem of any kind with our watch. After a few minutes, I was dismissed from the office, but after coming into the watch space I could still hear [the reporting officer] yelling at the [applicant] letting me know that everyone in the watch space could hear as well.

* * *

I could not remember being witness to such a poor display of professionalism from a LCDR . . .

The applicant also submitted a statement from JN who served with the applicant in 2001 and 2002. He stated that after qualifying for CDO he was assigned to the applicant’s duty section. He stated that he found the applicant to be a competent, knowledgeable and pleasant officer, and that he enjoyed working in his duty section. He stated that during the period in question, he observed several exchanges between the reporting officer and the applicant. He

state that the reporting officer was frequently loud, sarcastic, and gesturing wildly when talking to the applicant and during a number of all hand meetings, the reporting officer publicly reprimanded the applicant. In a related comment, JN stated that on at least two other occasions the reporting officer sent an all hands email that specifically “disciplined” the applicant. JN stated that on a daily basis he observed the reporting officer utilize intimidation, sarcasm, and public humiliation as leadership tools. He stated that he found the leadership styles at the unit so abhorrent that he submitted his retirement letter and left active duty.

The applicant stated that his reporting officer’s daily leadership involved intimidation, sarcasm, and public humiliation. The applicant claimed that he was inappropriately reprimanded by the reporting officer at many all hands meetings. He argued that the reporting officer was able to write the inaccurate disputed OER because he was both the supervisor and reporting officer. The applicant stated that while this practice was not prohibited, the check-and-balance system intended by maintaining a separate multi level rating chain was absent, which resulted in the reporting officer’s unchallenged and personally biased evaluation of the applicant.

The applicant argued that the reporting officer wrote a prejudicial and inaccurate OER, relieved the applicant of his duties, and transferred him without any documented or expressed reason. The applicant further argued that he was never given any performance recommendations for improvement or counseling of any kind.

VIEWS OF THE COAST GUARD

On October 25, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s request. He further adopted the facts and analysis provided by Commander Coast Guard Personnel Command (CGPC) and asked the Board to accept them as the Coast Guard’s advisory opinion.

CGPC stated that based on the record, the rating chain carried out its duties in accordance with Chapter 10 of the Personnel Manual and that the applicant has presented insufficient evidence to overcome the presumption of regularity. CGPC stated that the applicant’s case is built mainly on speculation and conjecture. According to CGPC, the marks on the disputed OER are well supported by the comments. In addition, CGPC stated that the rating chain refuted the applicant’s allegations that the disputed OER is inaccurate and motivated by retribution in detailed and objective declarations. CGPC stated that the rating chain was in the best position to observe the applicant’s performance and provide a fair, accurate, and objective OER.

The Coast Guard obtained declarations under penalty of perjury from the supervisor/ reporting officer and reviewer.

1. The reporting officer stated that the OER is an accurate account of the applicant’s performance for the period under review. He stated that during the reporting period, and previously by his predecessor, the applicant was counseled for not adopting to the changing watchstanding practices in light of the new post September 11 environment. He stated that the applicant had difficulty adapting to the changes that he did not agree with and was counseled accordingly. The reporting officer noted that the disputed OER is an above average OER with

just the two 4s in adaptability and judgment. He further stated that when comparing the applicant's performance to the standards for 4s on the OER form in adaptability and judgment, the 4s in these categories on the disputed OER are more than fair.

The reporting officer stated that the reviewer, who was his supervisor, concurred in the disputed OER without comment. He stated that the reviewer was briefed about every counseling session and concurred in the decision to remove the applicant from the watch and to transfer him to another section at Headquarters.

The reporting officer admitted that he had received a letter of reprimand for violations of the Uniform Code of Military Justice, including having an adulterous relationship with another female officer. He argued that the applicant's attorney represented the other party involved in the actions taken against him by the Coast Guard and is biased in his characterizations of the reporting officer's character. Therefore, he argued the attorney's input should be discounted.

The reporting officer stated that the individuals who provided statements for the applicant were sub-par performers, except for JN. In this regard, he stated that CDR D and Senior Chief T had been counseled on their performance. The reporting officer stated that because JN worked weekend shifts, he rarely had any contact with him. In addition, he stated that LCDR H worked in another branch in Headquarters and they were rarely in contact. Therefore he argued that LCDR H's statement that the reporting officer had a propensity for taking personal retribution against officers under his supervision through inappropriate marks and comments in the OERs could only have been obtained through second or third party information. He also denied the accuracy of LCDR H's comment. The reporting officer further stated as follows:

I had and have nothing against [the applicant]. He was a friendly, outgoing individual who although tried his best, he did not always perform in the manner that was expected for an officer in the USCG Command Center. He was transferred to G-OPF-3 because his transfer to Baltimore fell through and his performance in the Command Center was not up to the level needed in the post-9/11 environment, and NOT because of any perceived personality conflict. If [the reviewer] stated that as the reason, it was never conveyed to me and I would find it surprising because based on my prior assignment under [the reviewer], he would have transferred me instead of [the applicant] if there were a personality conflict.

2. The reviewer stated that he stands by the comments and marks in the disputed OER. He stated that during the time covered by the disputed OER he was the Chief of the USCG Office of Command, Control, and Preparedness and the applicant was a staff officer and command center duty officer within G-OPF. The reviewer stated that during this period he had an opportunity to very closely observe the applicant while he carried out his duties as a command center watch officer. He stated that the marks and comments in the adaptability and judgment categories on the disputed OER were somewhat gratuitous when compared against the standards but they gave the applicant the benefit of the doubt.

The reviewer stated that personnel stresses were high during the period following September 11, as rapid change was the rule rather than the exception. He stated that the reporting officer needed a 125% effort from each watchstander. Instead, the applicant provided the reporting officer with push-back that was supported by a tight cadre of his clique who took on a dissenting role of the "change resisters." The reviewer stated that the applicant would routinely and openly question authority and was quick to give excuses to senior flag officers and other officials when questioned about events during briefings. The reviewer further stated as follows:

[The applicant's] mannerism was to make disrespectful facial expressions and in the perception of observers not take seriously critiques of his reports and briefings. He seemed to treat senior officers in an overly casual and unprofessional manner. When this bothered me, I would discuss it with [the reporting officer] during our routine debriefings. [The applicant's] mannerism and lack of professional demeanor were criticized by several of our senior officers and officials both within the Coast Guard and the Department of Transportation and resulted in a counseling session between RADM B and me in the Admiral's office. The Admiral was not pleased with [the applicant's] morning briefing and directed me to take corrective actions to increase the professionalism of our watchstanders. I directed [the reporting officer] to take corrective action and he followed my instructions without attribution.

The reviewer stated that he and the reporting officer lost confidence in the applicant because of his lack of tact, unprofessional mannerisms, poor judgment and lack of follow-up and not because of his lack of knowledge. He stated that it was his decision to transfer the applicant to another assignment, although the reporting officer wanted to retain the applicant in the command center. The reviewer stated the applicant's transfer was for the good of the watchstanders and the applicant. He stated that the applicant protested the transfer to him, but he directed the applicant to make the move.

The reviewer stated that in 2002 the applicant did not mention anything to him about any interpersonal problems resulting from the reporting officer's alleged involvement in speculative extramarital activities. He further stated that although he interpreted the applicant's inability to respond to the reporting officer's leadership as a two-way problem, he still wanted the applicant to recognize that he was in a military chain of command situation and he had to obey orders.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 28, 2007, the Board received the applicant's reply to the views of the Coast Guard. In disagreeing with the views of the Coast Guard, the applicant stated that he did not file an OER reply at the time because he was advised not to do so by many superior officers upon seeking their advice. In addition, he further argued that the reporting officer told him that the disputed OER was not a career killer.

The applicant disagreed with the Coast Guard that he had submitted insufficient evidence to prove his allegations. In this regard, he stated that he has supplied statements from multiple

witnesses supporting his contention that the reporting officer treated him unprofessionally and inappropriately. He restated his claim that the reporting officer's attitude changed toward him after the applicant's wife saw him at lunch with another woman.

The applicant argued that the reporting officer's statement supports the applicant's argument that the disputed OER is not accurate. In this regard, the applicant pointed to the reporting officer's and reviewer's statements that the applicant received marks in the adaptability and judgment categories that were higher than he deserved. He argued that CGPC-opm failed in their responsibility to ensure accurate and fair grading because the comments in the disputed OER with respect to his adaptability and judgment did not support the marks of 4 that he received, but rather supported marks of 2s or 3s. The applicant argued that the scores of 4 in the subject categories demonstrate a higher level of performance than that referenced in the comments.

The applicant again contended that he was never counseled and that there is no documentation that any counseling occurred. The applicant further stated that the reporting officer was incorrect when he stated that the applicant's other OERs were average. The applicant stated that his other OERs were above average. He stated that the disputed OER stands out because it is not at the same level as his other above average OERs.

The applicant stated that his witnesses' statements verify that the reporting officer treated him wrong once his affair was exposed, which was not the same affair for which he was taken to admiral's mast. He argued that the reporting officer's credibility has been damaged by his own admission and by his reputation that has been documented by the Coast Guard.

The applicant stated that he retained his attorney because he is the best in the area of his expertise and that he is ethical and did not do anything improper. The applicant concluded his reply with the following:

The bottom line is that I was put into a situation I did not search for. Ever since my wife saw him with this other woman, I was treated differently by [the reporting officer], and only [the reporting officer]. I contend that I was treated in this manner by [the reporting officer] because I was a threat to his retirement.

I was never counseled except for two days before I was relieved of duty and transferred, approximately one month after the incident between my wife and [the reporting officer]. I find it amazing that several months prior to the [the reporting officer] called me "One of his BEST officers" and was adamant to have me extend a year in my current billet.

The OER is to capture a "fair and accurate" description of an officer's performance and is certainly not meant to be used as a counseling tool. Since both [the reviewer] and [the reporting officer] state that the marks I received are in-fact inaccurate, regardless in which way, they are still inaccurate. The comments themselves do not correspond to the marks assigned in several categories.

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 concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

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. The Board begins 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.²

4. The disputed OER contains two marks of 4 in adaptability and judgment. The remaining marks are 5s, 6s, and a single mark of 7. Although many comments in the OER are positive, the Board notes that it also contains the following comments:

Had difficulty adapting and incorporating changing watchstanding duties/policies.

Through maturation process and assistance of E-8 Assistant Duty Officer (ADO), watch team adequately processed a myriad of operational cases.

[The applicant] does need to improve his tact . . . and how he portrays himself to senior officers.

Needs to improve in thinking outside the box and not just following written guidelines that minimally cover required response actions.

5. The applicant alleged that the disputed OER is an inaccurate and unfair assessment of his performance for the period under review. He further alleged that the only accurate mark on the disputed OER is the 7 he received in block 5a.—looking out for others. The applicant argued that the supervisor/reporting officer used the disputed OER to write an inaccurate assessment of his performance because the reporting officer was biased against him because the applicant knew about the reporting officer's allegedly intimate lunch with a woman other than his wife. According to the applicant, the reporting officer considered the applicant's knowledge of the lunchtime meeting to be a threat to the reporting officer's retirement, particularly since the reporting officer had already been to mast and received a letter of reprimand for having an affair with a female officer. The applicant also alleged that after the sighting by his wife, the reporting officer intensified his abusive treatment of the applicant by yelling at him in private and in public

² 33 C.F.R. § 52.24(b).

and by removing him from duty as a command center duty officer and transferring him to another assignment within Headquarters.

6. The applicant has failed to persuade the Board that the disputed OER is an inaccurate assessment of his performance. He offered the statement from CDR D, a fellow watchstander, that the applicant was a superior performer during the period under review. LCDR H also stated that the applicant was an excellent watchstander. Further, JN, who was a member of the applicant's duty section at one point, described the applicant as being knowledgeable, competent and a pleasant individual. These three individuals offered their opinions about the applicant's performance, but it is the members of the rating chain who are charged with the responsibility for evaluating the applicant's performance. In addition, the statements from CDR D, LCDR H, and JN, are not more credible on the caliber of the applicant's performance than those from the members of the rating chain. For instance, CDR D was dissatisfied with her own OER from the reporting officer and attempted to have it removed from her record. Therefore, her view of the reporting officer could be somewhat biased. LCDR H was not a member of the Command Center Duty office and only saw the reporting officer occasionally. In this regard, the reporting officer stated that LCDR H worked in another branch of Headquarters and he rarely had contact with him. The reporting officer also stated that JN worked mainly on weekends and that the reporting officer rarely had any contact with him. Therefore, JN would have intermittent first-hand information about the interaction between the reporting officer and the applicant. In light of the above, it appears to the Board that the reporting officer was in the best position to judge and evaluate the applicant's performance, as it was his responsibility to supervise the applicant on a daily basis. In addition, the reviewer stated that he was able to observe closely the applicant's performance.

7. Nothing in the statements from CDR D, LCDR H, or JN proves that the applicant should have had higher marks on the disputed OER or that the OER comments are inaccurate. None of these individuals offered specific examples of any accomplishments by the applicant that should have been included in the OER that would have mandated higher performance marks. In contrast, the rating chain provided examples of the applicant's performance as well as criticism of it. In this regard, the reporting officer criticized the applicant for not adapting quickly enough to changing rules and policies after September 11, 2001, and for his lack of tact in dealing with senior officers. Both the reporting officer and reviewer stood by the disputed OER as an accurate assessment of the applicant's performance.

8. There is evidence in the record that the applicant was told by his wife that she saw the reporting officer allegedly having an intimate lunch with a woman other than his wife. However, the applicant has failed to prove that the reporting officer used the disputed OER to write a biased assessment out of fear that the applicant would expose the reporting officer's alleged intimate lunch with another woman, and thereby, threaten his retirement, particularly since the reporting officer had been to admiral's mast for an earlier infraction. The reporting officer admitted that he had received a letter of reprimand at admiral's mast, in part, for having an affair with another female officer. While the reporting officer's statement was silent on the applicant's claim that his wife saw the reporting officer having an alleged intimate lunch with another woman, the reporting officer did state that he held nothing, then or now, against the applicant. It appears to the Board that for the applicant to establish the reporting officer's bias against him

based on the applicant's knowledge of the luncheon incident, the applicant needed to show that the reporting officer knew that the applicant suspected him of being involved in an adulterous relationship. However, there is no persuasive proof that the applicant ever told the reporting officer, or anyone else in authority, that he suspected the reporting officer of committing adultery. In this regard, the applicant never stated that he informed the reporting officer that his wife told him that the reporting officer was at lunch with a woman other than his wife and not with KS, as the reporting officer allegedly had indicated to the applicant. The applicant speculates that the reporting officer could have learned that he had this information through the applicant's telephone conversation with his wife on a recorded line. However, speculation is insufficient to establish that the reporting officer knew that the applicant suspected him of adultery and wrote a biased performance evaluation because of it.

9. Additionally, the reviewer stated that the applicant did not mention any concerns to him about interpersonal problems between the applicant and reporting officer resulting from the reporting officer's alleged involvement in extramarital activities. Article 10.A.2.g.2.c. of the Personnel Manual places responsibility on the reported-on officer to bring to the attention of the next senior in the chain of command the existence of a situation that may necessitate a change to the rating chain during the reporting period or within 30 days after the end of the reporting period. The applicant makes his allegation against the reporting officer almost six years after the end of the reporting period, which causes the Board to question why he would raise the allegations at the time.

10. The applicant has submitted some evidence that the reporting officer yelled at him privately and publicly, and he alleged that such treatment intensified after the luncheon incident. CDR D stated that the reporting officer yelled at the applicant as well as herself in private and in public. Senior Chief T stated that he heard the reporting officer yelling at the applicant through a closed door. Others stated that the reporting officer disciplined the applicant at all hands meetings and through emails. However, these individuals do not provide sufficient detail of the circumstances at that time, they do not state specifically what the reporting officer said to the applicant during these alleged inappropriate encounters, and they do not give a list of dates and times that such conduct occurred. Therefore, without specific details it is difficult for the Board to judge whether the reporting officer's alleged behavior and inappropriate comments were abusive and/or created a work environment that unjustly impacted the applicant's performance for the period under review. The reporting officer and reviewer noted that the period immediately following the September 11 attacks was a stressful time and that the rules and policies were constantly changing. Therefore, it is conceivable that voices were raised at various times. Even so, the applicant has not shown that the evaluation of his performance in the disputed OER is inaccurate, i.e. he has not provided real examples of accomplishments during the reporting period that were not included in the OER, etc.

11. The applicant blamed his transfer from the Command Center Duty Office to another assignment within Headquarters on the reporting officer's alleged abusive treatment. However, the reviewer makes clear in his statement that senior officers had problems with the applicant's briefings and the manner in which he interacted with them. The reporting officer stated that this dissatisfaction on the part of the senior officers led to the reviewer being counseled by a flag officer after a briefing by the applicant. The reviewer makes it clear that it was his decision to

transfer the applicant, despite the reporting officer's desire to keep the applicant in the Command Center Duty Office assignment. The reviewer stated that he and the reporting officer lost confidence in the applicant because of his "lack of tact, unprofessional mannerisms, poor judgment and lack of follow-up and not because of his lack of knowledge." The reviewer's statement supports the reporting officer's statement that he had no ill-will toward the applicant and that his removal from duty as a command center duty officer was performance based. Moreover, there is nothing in the disputed OER suggesting that the applicant was formally or informally relieved of duty for cause. The OER is a detachment of officer OER that suggests that the applicant was moving on to a new periodic assignment, as most officers do.

12. The applicant argued that there was no documented counseling of any problems with his performance in his record and he denied that he was ever counseled until approximately 2 days before being reassigned. There is no requirement that officers holding the rank of LT and above receive written counseling. The Personnel Manual states clearly that feedback occurs whenever a subordinate receives any advice or observation from a rating chain official. It further provides that if such feedback is not clear, it is the reported-on officer's responsibility to seek such clarification. See 10.A.1.c.5. of the Personnel Manual. Senior Chief D stated that he and the applicant were often called by the reporting officer and spoken to about procedures or changes that were allegedly unknown to them. Despite the alleged tone of these conversations and the alleged newness of the policy and procedure being discussed, such feedback is considered counseling under the Personnel Manual.

13. The applicant alleged that some of the comments that he proposed for inclusion in the OER were omitted, such as his plan to have fishing boats assist the Auxiliary with security around New York City after September 11 and the fact that he volunteered to help clean up the World Trade Center. However, the applicant gives September 13, 2001, as the date for one these accomplishments and no date for the other. The Board notes the beginning period for the disputed OER is October 1, 2001. Therefore if the accomplishments occurred before the beginning date of the disputed OER, they were properly not reflected in the disputed OER. Article 10.A.4.c.7.b. of the Personnel Manual states that the reporting officer shall review the reported-on officer's performance and qualities observed and noted during the reporting period.

14. The applicant noted the fact that his supervisor and reporting officer were the same individual, which he acknowledged was permissible under Article 10A.2.e. of the Personnel Manual. He suggested by having the reporting officer also serve as the supervisor, he was denied the checks and balances built into the officer evaluation system. However, the reviewer provides the check and balance in situations where the supervisor and reporting officer are the same individual. Article 10.A.2.f. of the Personnel Manual state that the reviewer ensures that the OER reflects a reasonable consistent picture of the reported-on officer's performance and potential, adds additional comments as necessary; and ensures that the supervisor and reporting officer have adequately executed their responsibilities. There is no suggestion in the record that the reviewer was incapable of performing his OER responsibilities. By signing the disputed OER and not attaching comments, the reviewer expressed his agreement with the reporting officer's assessment of the applicant's performance for the period under review.

15. The applicant also argued that the reporting officer's and reviewer's statements that the 4s in the adaptability and judgment categories were overly generous support his argument that the disputed OER is inaccurate. The Board finds that even if the rating chain stated that it could have marked the applicant lower in these two categories, any such error was beneficial the applicant. In this regard, the Board notes that a 4 is considered an average mark and anything below that is considered to be below average. The suggestion of the rating chain at the this point that they gave the applicant the benefit of the doubt when marking him in adaptability and judgment categories inured to the benefit of the applicant and is not proof that the disputed OER as a whole is inaccurate.

16. The applicant suggested that the mark of 7 in block 5a is the only correct mark on the disputed OER. However, the applicant has put fourth very little evidence, if any, to show that all of his marks should have been of this caliber.

17. The applicant has failed to prove an error or injustice with respect to the disputed OER. With no error or injustice having been established, there is no basis on which to consider the applicant's request for removal of his calendar year 2006 failure of selection for promotion to LCDR. Without a removal of the failure, there is no basis on which to adjust the applicant's LCDR date of rank once promoted to that grade. The Board notes that the applicant was selected for promotion by the calendar year 2007 LCDR selection board with the disputed OER in his record.

18. In light of the above, the applicant's request for relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

