

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-029

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 case after receiving the completed application November 20, 2008, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 27, 2009, is approved and 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 (a) amending a mark and certain comments in his officer evaluation report (OER) for the period June 28, 2006, to April 30, 2007, when he was the commanding officer (CO) of a xx; (b) removing his failure of selection for promotion to commander (CDR) in calendar year 2008 and in 2009 if he is not selected by the CDR selection board convening in late July 2009;¹ (c) backdating his CDR date of rank to what it would have been had he been selected for promotion in 2008 if he is selected for promotion by the first CDR selection board to review his corrected record; (d) awarding him corresponding back pay and allowances; and (e) granting such other relief as may be just and proper under the circumstances.

The applicant alleged that, although the disputed OER is generally favorable, it is unfair and inaccurate in that it includes a "below average mark of 4"² in the performance category

¹ On August 24, 2009, the applicant informed the Board that he was selected for promotion by the CDR selection board that convened in July 2009. Therefore, if the Board granted full relief in this case, it would order the applicant's CDR date of rank backdated to what it would have been had he been selected for promotion in 2008 and award him back pay and allowances.

² On an OER form (CG-5310B), Coast Guard officers are rated in eighteen different performance categories, such as "Adaptability," "Professional Competence," "Teamwork," and "Judgment" on a scale of 1 (worst) to 7 (best).

“Workplace Climate”³; “vague and damaging remarks” by his Reporting Officer;⁴ and no recommendation for promotion to CDR. He asked the Board to correct the disputed OER by raising the mark of 4 for “Workplace Climate” to at least a 5; by expunging two of the Reporting Officer’s comments (quoted below) from the OER; and by remanding the OER to the Reporting Officer for reconsideration of his mark of 4 on the comparison scale⁵ in block 9 of the OER and his comments in block 10 and to the Reviewer, who may choose to append Reviewer comments. The comments that the applicant wants the Board to expunge from the OER are underlined in the quotations below:

From block 7: “... A dedicated & committed CO, yet his command has had numerous issues this past year with command climate that left some members of his command feeling alienated; he was proactive in trying to overcome/resolve the command challenges he faced. ...”

From block 8: “... Did not waiver [sic] under pressure; made tough decisions even when unpopular, though approach was viewed by some as inflexible. ...”

Allegations about Mark of 4 for “Workplace Climate”

The applicant alleged that his Supervisor lowered his mark for “Workplace Climate” from 5 to 4 because his Reporting Officer suggested to his Supervisor that he reconsider his portion of the OER. In support of this allegation, the applicant submitted a declaration signed by his Supervisor, who was Chief of XXXXXX Forces in the Xxxxxx Area from July 2005 to July 2007. The Supervisor wrote that during the evaluation period for the disputed OER, he

observed [the applicant] perform under numerous conditions and address issues pertaining to the command climate of his unit. Specifically [he] was confronted by an issue stemming from an OER [he] submitted for one of his junior officers resulting in an EEO complaint. ... The crux of the issue revolved around a junior officer not satisfied with an OER produced by [the applicant’s] command. When confronted with the problem, [the applicant] took immediate and positive action to address this issue within his command. As his Supervisor, [the applicant] and I strategized on what actions he was going to take to identify any different perspectives between different demographic groups within his command. In addition to meeting with EEO counselors and conducting

³ According to the OER form (CG-5310B), the category “Workplace Climate” evaluates an officer’s “[a]bility to value individual differences and promote an environment of teamwork, innovation, open communication, and respect.”

⁴ Officers are evaluated by a “rating chain,” which includes a Supervisor, who is normally the person to whom the Reported-on Officer reports on a daily basis and who completes the first thirteen numerical marks on an OER and the supporting comments for those marks; a Reporting Officer, who is normally the Supervisor’s Supervisor and who completes the remaining marks and comments on an OER; and the Reviewer, who is normally the Reporting Officer’s Supervisor, who reviews the OER for consistency, may add a page of comments at his discretion, but need not have personal knowledge of the Reported-on Officer’s performance. PERSMAN, Arts. 10.A.2.a., 10.A.2.d.1.a., 10.A.2.e.1.a., and 10.A.2.f.1.a.

⁵ The comparison scale on an OER form is not actually numbered, but as with the performance categories, there are seven possible marks on the scale from the first (“performance unsatisfactory for grade or billet”) to the seventh (“BEST OFFICER of this grade”). For LCDRs, a mark of 4—i.e., a mark in the fourth, or middle, spot—on the comparison scale denotes a “Good performer; give tough, challenging assignments.” The Reporting Officer assigns the Reported-on Officer a mark on the comparison scale by comparing him with all other officers of the same rank whom the Reporting Officer has known throughout his career.

a command climate survey, [the applicant] sought out the advice of the District ... Command Chief to both get a pulse of the enlisted crew as well as the women onboard. The results of the counselor's visit, survey and District ... Command Chief visit were documented and forged into a plan of action. These steps and results were briefed up the XXXXXX chain of command, up to the Chief of Staff and found satisfactory. [The applicant] met all of my expectations, and thus XXXXXX's. Despite this, the junior officer proceeded with [her] EEO formal complaint [filed in March 2007].

When it was time to draft [the applicant's] OER, as standard practice for all OERs, I provided a signed page one and two [the Supervisor's portion of the OER] and a draft page three [the Reporting Officer's portion] to my supervisor [who was the applicant's Reporting Officer]. I received feedback on both. One, I was asked to reconsider a [mark of] 5 I gave [the applicant] in Workplace Climate. My supervisors did not feel the mark was supported by the comments and also [said it] was questionable based on the history of the EEO Complaint and an EER [enlisted employee review] appeal issue addressed by my supervisor with [the applicant]. Although [the applicant] made positive and immediate actions toward his command climate, after consideration of the 5, I lowered the mark to a 4. Two, I was told my draft of page three was to be re-written as well by [the applicant's] Reporting Officer. In my original draft, I recommended [him] for promotion as well as for positions of increased responsibility. While [page three of an OER is] within the Reporting Officer's privilege, I felt an uneasiness on behalf of the Reporting Officer about [his] decision to re-write page three. During several informal discussions with the Reporting Officer, I expressed my satisfaction with the steps [the applicant] took with the EEO complaint as the Commanding Officer and a leader. The Reporting Officer expressed his own struggles with meeting the right tone on page three and satisfying the expectations of the [OER Reviewer]. Upon [his] completion of his revisions, I was allowed to review the new page three, which was contrary to my review of [the applicant's] leadership dimension during the period of report. Also removed were the promotion and positions of increased responsibilities recommendations.

The applicant acknowledged that the Supervisor did not say that he was ordered to lower the mark for "Workplace Climate," from a 5 to a 4, which would have been a clear violation of the Personnel Manual. However, the applicant argued, the mark of 4 was clearly "not his [the Supervisor's] idea." With respect to the mark of 4, the applicant asked the Board to bear in mind the other high marks he received on the disputed OER and his prior OERs and noted that he has received only one other mark of 4 as a LCDR, back in 2002, and his average mark for "Workplace Climate" in the eleven OERs he has received as a lieutenant and LCDR is 5.45. He submitted several statistical charts of his OER marks. The applicant further alleged that the mark of 4 is contradicted by the Commendation Medal he received for his tour at the XXX and by the many members of his command who have submitted signed statements on his behalf (see below). He argued that these statements support a mark of at least 5 for "Workplace Climate."

Allegations about the Reporting Officer's Comments in the Disputed OER

The applicant alleged that the comment of the Reporting Officer about "issues" with the command climate leaving some members feeling alienated in block 7 of the disputed OER is vague, incomplete, and unduly prejudicial. He argued that the comment is so vague about the command climate "issues" that it "leav[es] to the imagination of promotion boards (and other readers) the nature and gravity of the problem(s)." He also argued that the comment is prejudicially incomplete because it does not state whether the members' feelings of alienation were justified or whether the applicant's proactive measures were successful.

The applicant alleged that the comment by the Reporting Officer in block 8 of the disputed OER indicating that some people viewed his approach as inflexible is similarly prejudicial in that it leaves the reader wondering whether the view that his approach was inflexible was justified or unreasonable. The comment, he alleged, permits a “shadow of criticism to float around without offering the reader any sense of whether the criticism was warranted.” He argued that the comment cannot be reconciled with other comments in the disputed OER stating that he “[d]id the right thing even when it was difficult” and “[s]ucceeded in making even unpopular policies or decisions work.” Therefore, he argued, the OER is “at war with itself.”

The applicant explained that “what was really going on” at his command was that the Executive Officer (XO) of the XXX, LT Y, had “made a practice [of serving] as a self-appointed ombudsman for minority personnel regardless of the unit to which those personnel were assigned.” Rather than supporting the command, the XO had “established himself as a separate focal point and materially eroded the harmony of the command cadre, with predictable effects on the unit.” In 2006, the applicant alleged, a white female lieutenant at the XXX, LT X, decided she was being discriminated against because of her gender when she received some low marks and poor comments on her OER, and she filed an EEO complaint. The applicant, who was her CO and Reporting Officer, believed that the OER had been correctly and fairly prepared but agreed to modify his comments on the OER. The XO, who was her Supervisor, refused to raise any of the marks he had assigned to her because they were accurate and fair. The applicant stated that LT X’s complaint is still pending in the DHS Office of Civil Rights and asked the Board to consult that office since the decision on her complaint is pertinent to his application and the Board’s decision.

Regarding the command climate at the XXX, the applicant stated that he was the CO for nearly three years and that almost 200 enlisted members and officers served under his command for all or part of that period. Of the roughly 75 active duty and 33 reserve personnel who were assigned to the XXX during the reporting period, fewer than five voiced a complaint. “To permit their voices to drown out all that was good and commendable about [his] performance of duty and the excellent climate he was able to achieve within this command is deeply unfair.” In support of these allegations, the applicant submitted several statements from members of his command (see below).

The applicant also submitted a copy of a memorandum he wrote to the Xxxxxx Area command about the disputed OER on May 24, 2007. In this memorandum, he stated that on June 22, 2006, he met with his prior Reporting Officer and a Master Chief Petty Officer (MCPO A) about command climate concerns. During subsequent visits to the XXX by his new Reporting Officer, MCPO B, and MCPO A in the fall of 2006, they “relayed no concerns with [the XXX] above what any unit goes through.” After the new Reporting Officer’s visit in October 2006, the applicant’s Supervisor told him that the Reporting Officer had said that the applicant had ideal attributes for the CO of an XXX. At a CO’s conference in March 2007, the applicant advised the Reporting Officer that he had “learned a lot about [his] previous XO’s ... character since his departure in [July 2006]. We spoke for approximately five minutes, and at no time did [the Reporting Officer] discuss my upcoming OER or performance.” When the XXX underwent an EO Review on April 4 and 5, 2007, the reviewers identified “no glaring issues above what any unit would have, and most of our issues that were not positive in nature were old

issues from 6 months to a year ago.” The applicant alleged that his rating chain must have given undue weight to a few negative comments by just a few members of his command. Moreover, it was the XO who instigated these complaints and “manipulated and upset the system for those under him.” The applicant stated that he had trusted the XO, who had “abused the trust of his position The worst part about the XO’s behavior is that my crew suffered because of it.” The applicant further alleged that the steps he took to improve the command climate—e.g., conducting the command climate survey in July 2006 and inviting MCPO B to the XXX—were used against him in the disputed OER. He pointed out that while a few members had complained that he was “too tough,” he had held only five captain’s masts to mete out nonjudicial punishment (NJP) during his three-year tour. The applicant noted the many awards his unit and individual members of his unit had received, the many extra responsibilities and successes of the XXX, and the fact that on prior OERs, he had consistently been recommended for command ashore since 1997. He argued that the disputed OER would “essentially render [him] no longer of use to the service.”

Allegations about his Failure of Selection for Promotion

The applicant stated that if the disputed OER had been written fairly and accurately, his record would clearly have been more competitive when it was reviewed by the CDR selection board in 2008. He noted that the disputed OER was one of his most recent and so would have received careful scrutiny. He argued that because the disputed OER “rendered his overall record less favorable than it otherwise would have been, he is entitled to relief from the failure of selection” because there is nothing else adverse in his record that would have caused him to fail of selection in any event. Likewise, he argued, if the Board does not correct his record before it is reviewed by the selection board in July 2009, he will be entitled to removal of his failure of selection if the 2009 board also fails to select him for promotion.⁶

SUMMARIES OF OTHER STATEMENTS SUBMITTED BY THE APPLICANT

Statement of MKCM X

MKCM X, who worked at the XXX and now works in the xxxxxxxxxxxxxxxxxxxx, highly praised the applicant’s dedication and effectiveness as a CO. He stated that the applicant held members accountable for their actions but also provided additional opportunities to succeed. He stated that the applicant always explained the reasoning behind his hard decisions, but “a[s] with any crew, we had members who didn’t agree with the command decisions or direction.” MKCM X stated that overall the XXX “had a great crew who worked hard and carried out their mission above and beyond.”

Statement of the XXX’s Human Relations Chief

MSTC X, the Human Relations Chief for the unit since May 2006, stated that the command climate had improved significantly since the summer of 2006, when the XO, LT Y, transferred out. He further stated that the XXX “is no longer a hostile work environment. It is my

⁶ See footnote 1, above.

opinion the former [XO] actively worked against [the applicant], and on one occasion attended a Command Climate Meeting with [MCPO A] where he actively questioned [the applicant's] decision making. Based on feedback from the crew and the Human Relations Counsel on board [the XXX], all perceived Command Climate issues ceased following the transfer season of 2006 and the departure of the former [XO]."

Statement of LT Z, the New Operations Officer

LT Z, the Operations Officer who reported aboard the XXX in June 2006, stated that when he arrived at the XXX his "turnover" with his predecessor in the billet, LT G, was "scary." She gave him the impression that the applicant was going to steamroll him and would harm his career if he did not just accept whatever the applicant said. On LT Z's first day on the job, BMC R burst into his office very angry because he thought the applicant had replaced him with someone else in a leadership position. As it turned out, BMC R had simply misunderstood that the applicant had assigned someone else to the job temporarily because BMC R himself was away from the unit for five weeks. However, BMC R exhibited such behavior repeatedly during the next seven months until he left the XXX.

LT Z further stated that upon his arrival, he found that the officers and chiefs at the XXX were bickering and degrading each other in mixed company. The chiefs rarely voiced their concerns or found solutions to the problems. However, only BMC R, LT X, and CWO R were actually unhappy with the applicant as CO. These three "complained the loudest but did nothing to make matters better for themselves or their crews." When LT Z offered to take any legitimate complaint outside of the chain of command on their behalf, none of them took him up on the offer or even elaborated on their concerns. Shortly thereafter, the XO called him into his office and said, "You are fixing too many problems too fast." The XO instructed him to stay in his own office and let the complainers go to the XO instead of trying to fix anything. Just before leaving the XXX in July 2006, the XO told LT Z not to turn his back on the applicant because the applicant would stab him in the back and ruin his career "with a smile on his face."

LT Z stated that at a meeting he attended in July 2006, he sought a private consultation with the applicant's Supervisor because of the seriousness of the comments made by the departing XO and "rumors of potential misconduct, or perceived biases exhibited by [the applicant]." The Supervisor "assured [him] that [the Xxxxxx Area Command] was discussing [the applicant] and that if there were any action that needed to be taken, they would not hesitate." LT Z also met with MCPO A and passed along concerns he had heard from the XXX's crew.

LT Z stated that he was present during two senior level reviews of the XXX's command climate: one by the new Reporting Officer in October 2006 and another by MCPO B in November 2006. LT Z stated that after meeting with the crew and conducting their reviews, those officers found "nothing actionable from their perspective." LT Z opined that the applicant "was doing the very best job any officer could leading an immature middle management" and that the applicant "has been criticized for holding non-performers accountable. The previous XO withheld critical information from the CO and actively spoke out against him. [The prior Operations Officer, whom LT Z succeeded] had committed herself to her own career opportunities outside of the Coast Guard prior to her arrival and was either unable or unwilling to properly manage her

people and obligate herself to the unit/mission.” LT Z stated that, contrary to the prior XO’s warnings, he found the applicant to be “a fair, honest supervisor who is passionate about his work. He has allowed me to institute changes, to modify his standards and to try new approaches to old problems as long as I provide him the facts and figures to support them and follow through with them.”

Statement of the New XO

The new XO reported to the XXX on July 5, 2006, and relieved the old XO on July 7, 2006. He stated that during that three-day relief period, the old XO made no mention of any issues with the command climate. However, LT Z, the new Operations Officer told him that there were some issues between the applicant and “a member of the wardroom” and that MCPO A had visited the XXX about those issues. In his initial meeting with the CO, the applicant told him that some questions about the command climate had been raised and that the applicant would discuss them with him after he had been on board a while to get his unbiased opinion about the command climate. Thereafter, the new XO assumed that everything had been taken care of because he could not discern any command climate issues at the XXX. Later, the applicant told him that he wanted to work with the new XO as a team and that he would make any changes necessary with respect to any command climate issues.

The new XO stated that the applicant’s Reporting Officer visited the XXX on October 27, 2006, “to ascertain for himself the state of the climate at the command. He met [separately] with the junior Petty Officers, First Class Petty Officers, Chiefs, and all [commissioned and warrant] officers.” At these meetings, the Reporting Officer asked the crew if they had any issues with the command climate or with the applicant as CO. At the meeting the new XO attended, however, no one raised any issues at all even after the Reporting Officer told them that it was their duty and opportunity to raise any command climate issues. The Reporting Officer told them that he could “lop the head off the command” if necessary but that he saw no need for such action and thought that the XXX “had a good thing going.”

The new XO stated that on November 7, 2006, MCPO B visited the XXX because the applicant had invited “her opinion on any perceived command climate issue.” Like the Reporting Officer, MCPO B met separately with the various grades and ranks. Upon leaving, she told him and the applicant that “the crew was extremely happy with [him,] the new XO, and that the climate changed immensely following [the prior XO’s] departure. She told them that a few members had program-related complaints, such as wanting to deploy and physical training requirements and that the first class petty officers “could be more involved.” She told them that she would provide further thoughts about her meetings with the crew in a follow-up report, but she never did send them that follow-up report.

The new XO stated that on January 23, 2007, MCPO A visited the XXX to hold similar meetings with the various grades and ranks. Upon his arrival, MCPO A stated that the program manager was concerned that MCPO A was having to visit the unit twice in a six-month period, but that it was his job as the Command Master Chief to visit units in that area of operations and to answer the crew’s questions. Upon departing, MCPO told the new XO that there were “very

few issues” raised and none of those that he mentioned concerned the command climate, discrimination, or anything about the applicant’s performance.

The new XO stated that the Xxxxxx Area EEO Unit visited the XXX from April 3 to 5, 2007, for a “formal climate assessment” because the Commandant had ordered that all Coast Guard units undergo such an assessment. The EEO staff met with the various grades and ranks. Upon leaving, the EEO staff gave the XO and the CO “a lot of exceptional feedback. There was no mention of any sexual discrimination and even a mention of the crew appreciating the command’s quick reaction to the perception of verbal discrimination toward a member born in Russia.” The EEO staff also noted that the crew had reported that two female junior officers had left the XXX in 2006 but said that the crew did not know why those officers left. The EEO staff gave the XXX “a very positive assessment.”

The new XO stated that, based on the four command climate assessments, he concluded that “any issue that there may have been [was] no longer salient.” He stated that since the applicant was the only officer at the XXX who did not transfer in the summer of 2006, it is “fair to conclude that [the applicant] was not the cause of any previously mentioned command climate issues.” The new XO also concluded that the applicant had been undermined by officers who were no longer at the XXX, including the old XO. He also stated that the applicant had provided the XXX crew “every opportunity ... to gain operational qualifications, attend C Schools and ... develop professionally.”

Statement of LTJG T

LTJG T, who was served as a xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx team leader at the XXX from October 2005 to July 2008 stated that the applicant strongly supported his training and career and encouraged all unit personnel to qualify in as many fields as possible. He stated that he never witnessed unfair treatment of personnel.

Statement of LT C

LT C, who was a team leader for xxxxxxxxxxxxxxxxxxxx at the XXX from August 2005 to August 2008, stated that during this period “the Wardroom and Chiefs’ Mess experienced more than its fair share of division/conflict of which most revolved around the unit’s Executive Officer [the old XO]. ... Upon first reporting to the unit, the XO assured me that he communicated openly and frankly with the CO and that the two spoke with a unified voice. I later determined that this was not the case. I now believe the XO withheld information from the CO to give the appearance he had everything under control. The XO enjoyed intimidating people and keeping everyone guessing about his demeanor for that day.” LT C stated that he believes that a female team leader complained about the CO favoring another team, but LT C thought her complaints were due to “her own inability to motivate/lead her team and her heavy influence by the XO. She shared openly her evaluation with me, which I thought was fair and accurate.” LT C stated that about six months into his tour, “tensions began to boil over,” and the CO initiated command climate surveys and assessments. The unit was significantly reorganized when the CO heard the petty officers’ recommendations. LT C stated that the CO was an effective leader who was undermined by the XO.

Statement of LTJG R

LTJG R, who was a Reserve officer assigned to train coxswains and create a Reserve boat division at the XXX from June 2006 through April 2007, stated that the applicant was a successful leader with a very common leadership style in that he set clear expectations and had an open-door policy but expected members to follow the chain of command. The applicant was well-liked and respected by the crew. LTJG R stated that he remembers speaking to one female LTJG at the XXX who disliked the applicant, but she was “generally displeased with the Coast Guard and life in general. ... I do feel she was able to influence a small group of individuals to follow her.”

Statement of LT E

LT E, who served as the officer in charge of Detachment 1 and in the planning department at the XXX from June 2004 to June 2007, stated that he “did notice some unique issues during my tour, but ... find[s] it difficult to directly link those issues to the [applicant].” He stated that some of the officers were not content at the XXX. Some of the mid-level leaders did not have maturity, insight, or professionalism to bring certain issues to the attention of the applicant, so he did not have a chance to resolve them. The XXX had been established in 2002 and “lacked sufficient programmatic policy and doctrine for effective management,” but the applicant “did much to avoid the ‘trickle down’ effect of this potentially detrimental and non-standard structure and took a much needed proactive and visionary approach to operations & general leadership.” The XXX “was not without its problems, but I believe [the applicant] did the right things at the right times to promote the most efficient and effective command climate.”

Statement of MSTC Y

MSTC Y, who served as a tactical action officer and chief of the planning department at the XXX for six months from June to December 2004, stated that the applicant was a good CO and ran the XXX like the prior CO ran it. MSTC Y never received a complaint about the applicant. MSTC Y stated that he took advantage of the applicant’s open-door policy on several occasions and was treated fairly.

Statement by GMC X

GMC X stated that he worked at the XXX as a weapons officer and tactical action officer during the reporting period for the disputed OER. He stated that the command climate at the XXX was “goal oriented” and that personnel were encouraged to advance their careers with training. He stated that some people were happy to be assigned to the XXX, but others were not and “could never be made happy or content.” The applicant, he stated, had a great passion for the operational programs, and appeared “[o]n face value ... [to] favor[] certain divisions over other divisions In all actuality he was trying [to] grow the program while protecting it at the same time. [The applicant] did not have the luxury of following in some[one] else’s footsteps. ... [He] could not allow personalities, politics or the unknown jeopardize equipment, safety of personnel ...”

Statement by MSTC Z

MSTC Z, who served on the XXXX at the XXX from April 2003 through June 2007, stated that the command climate was excellent throughout the applicant's tour of duty as CO. All personnel were encouraged to achieve their best. "There were no unfavorable or prejudicial conditions that existed." The applicant always treated people fairly and with respect.

Statement by BMI D

BMI D, who served on the XXXX at the XXX from June 2004 to July 2007, stated that the unit had a positive command climate. He was allowed to attend and to organize many training sessions. The command "was fair, supportive, and more than willing to work with its members to get the job done."

Statement by ET1 A

ET1 A, who served on the XXXX at the XXX from June 2002 to March 2007, stated that the command climate "was favorable and afforded all members of the unit the ability to succeed at their positions." ET1 A was allowed to train as a xxx team member even though he was not assigned to a traditional law enforcement billet. He found the applicant to be a fair and impartial CO who required his crew to perform professionally and competently.

Statement by YN1 S

YN1 S stated that while he served in both the administrative and operations departments at the XXX from July 2004 through June 2008, the applicant was faced with "a lot of difference obstacles. I think at times the command climate was stressful on the people at the unit. The XO [LT Y] at times clashed a bit with [the applicant]. ... What I hear from the members at the unit at that time was how stressful it was with certain people with members of the Command. ... I think the only thing that I noticed was [the applicant] was very hands on with the Law Enforcement Team. [He] paid a lot of attention to them and I think some members did not like that very much. I think the members felt that [he] gave them special treatment. I did not see that at all. My stress at the time was just with the Executive Officer [LT Y]. [The applicant] was great to me and my fellow co-workers."

Statement by BMI J

BMI J, who served on the XXXX at the XXX from June 2004 through July 2007, and was a member of a law enforcement team, stated that the applicant was always highly professional during a very high tempo operational period. He stated that the applicant never disregarded his obligation to the other departments and stayed focused on the needs of each and every member of the crew. The command climate was positive as the applicant was fair, encouraging, and dedicated to the crew.

Statement by HS1 M

HS1 X, a corpsman for the XXX, stated that the applicant “embodies the characteristic traits of a true leader.” He is approachable, with an open-door policy, leads by example, and is receptive to ideas from the crew. HS1 X stated that he was allowed “to serve on many missions, some scary in my book, but all rewarding in the end. [The applicant] was a part of several missions with us too.”

Statement by MK1 H

MK1 H, who served as the acting Dive Officer at the XXX from February 2003 through July 2007, stated that the applicant was “always very fair and open-minded with all. ... The command climate was never a problem with me or those who worked both for and with me.”

Statement by PS1 W

PS1 W, who served at the XXX as a reservist training other reservists in law enforcement tactics, stated that the applicant “clearly stated his goals and established realistic and achievable timelines” for the LE program. Once when the “Reserve side experienced a low point” because their qualifications were lapsing, the applicant called an all-hands meeting for reservists, took responsibility for having been unaware of the problem, and took immediate steps to fix it by having the active duty side support the training and requalification of the reservists. The applicant showed “unyielding support and genuine respect and concern for his people at all levels.”

Statement of the Former Operations Officer from June 2004 to June 2005

A former Operations Officer at the XXX stated that the applicant deserves accolades for his leadership in overcoming many “intractable strategic, operational, and tactical challenges within the XXX program.” One of these challenges, he stated, was a decision by Headquarters to halt all XXXs’ deployments to non-XXX ports, which “led to a precipitous drop in morale.” However, the applicant reversed the demoralizing effect of the lack of deployments with leadership and communication. Another of these challenges was the arrival of the prior XO, who had “an agenda to subtly undermine, vice support, the mission for which the Commanding Officer was charged with performing.” He stated that in 2005, the old XO conducted

hours-long meetings behind closed doors, ... lengthy exclusive meetings in the absence of witnesses, and [had] almost a predatory-like counseling approach to a select few officers, chiefs, and crew who were struggling to adapt to a very dynamic unit. I believe that because of personality and cultural differences with his CO, [the old XO] intentionally took advantage of crewmembers who were struggling to adapt to their surroundings to carry out his agenda to undermine the command philosophies and direction. I believe that he intentionally tried to convince them that their CO did not have their best interests at heart. In my view, nothing could be further from the truth. I am very confident the other 95% of the crew felt the same as I ... that our CO supported us to the maximum extent possible and was succeeding in moving the unit forward in the face of daunting challenges. They told me so.

Statement of the Commanding Officer of a Co-Located Reserve Unit

The CO of a xxxxxxxxxxxxxxxx located with the XXX stated that he had “direct interaction with [the applicant] and numerous members of his unit as they formed the core group of personnel assigned to the XXXX and the XXX/XXX communities were mutually supporting in training of water and shore security operations.” He stated that he has witnessed “the XXX from the beginning [in 2002] through the tenure of [the applicant’s] command into the unit that exists today.” The CO stated that the applicant and the XXX had to operate at a very high tempo with new and difficult missions. The CO, a Reserve commander, stated that it

was evident that spirits were high and enthusiasm carried the young sailors into new training and missions because of the support and leadership given by [the applicant]. During this time I had developed a personal relationship with a majority of his command and senior enlisted personnel. I also observed a distinct change in these individuals from enthusiastic and openness with [the applicant] to closed and standoffish when [the old XO] was present. I believe that this is the crux of the issue and not [the applicant].

The perception of a [poor] command climate did not exist prior to the arrival of [LT Y] as the XO and left as soon as he was transferred from the XXX. This is not the first such incident of command climate issues to arise where [LT Y] has been assigned. In my role as then] XO of XXX ... I have had several incidents involving [LT Y]. The disturbing nature of [his] unauthorized involvement with personnel not assigned to his unit or not within his scope of authority extends back to 1995/1996. At that time he injected himself into the internal personnel management of XXX ... then under the command of [CDR S]. This incident involved an active duty SK1 who [LT Y] felt was being unfairly treated because he was black despite the fact that no complaint had been filed by this member. [LT Y], who had no involvement with XXX ..., insisted that the Command at XXX ... be investigated for racial intolerance. The next major incident occurred when [LT Y] again without authority or invitation from the member insisted that a black reserve petty officer was being treated to racial intolerance. This petty officer never made any complaints or statements to the command or the command Senior Enlisted Advisor. When the petty officer was questioned about the possibility of racial issues between him and any member of the XXX [the petty officer denied any such issues]. The third incident was the involvement of [LT Y] into a dispute between enlisted personnel where he attempted to bypass the XXX command and took it upon himself to look into the matter as [though] we were not to be trusted to investigate it properly. A fourth incident arose when [LT Y] isolated a newly reported member of XXX ... and told this active duty petty officer that the unit had a history of racial intolerance and that if he had any issues he was to report them directly to [LT Y]. This was in direct violation of Coast Guard policy involving the handling of EEO issues.

All of these incidents were handled by the command at XXX ... in accordance with Coast Guard policy and at no time was any racial intolerance discovered or reported by the members involved. Despite the proper response by the command and the fact that [LT Y] was not assigned as the EEO Officer for the Integrated Support Command ... he continued to insist on more action even demanding that the command of XXX ... provide written reports to him. Those incidents that occurred while [LT Y] was assigned as the XO at XXX were reported to [the applicant] asking that he intercede and order [LT Y] to follow proper chain of command for reporting and investigating of alleged violations of the Coast Guard EEO policy. And that [because] he was not the duly authorized EEO representative for the base, he should not bypass the established Coast Guard procedures and allow those responsible to carry out their duties as assigned.

As a result of my request to [the applicant] that [LT Y] be counseled on his inappropriate actions in the personnel management of another unit, the issue would not be properly resolved. [LT Y] continued to call me at my civilian job insisting that I deliver to him a copy of the written investigation for the alleged racial intolerance at the unit despite the fact that he had no authority

to review any such reports and/or make any such request from the unit. Again I requested that [the applicant] counsel [LT Y] on his inappropriate actions and that he was overstepping his authority in regards to this matter. Since [LT Y] would not back down from his insistence to interfere with matters outside his unit, [the applicant] requested that I attend a meeting with him and [LT Y] to discuss the issue.

The CO of the XXX stated that at his meeting with the applicant and LT Y in October 2005, the use of the chain of command and proper EEO authorities was explained to LT Y. However, LT Y stated that the XXX had a history of racial intolerance and was commanded by “white racist cops,” who had promoted “one of our own” despite LT Y’s objections. The CO did not understand these comments because no one in the prior or current command at the XXX had been a police officer and the ensign who had been promoted despite LT Y’s objections was Latino. The CO alleged that LT Y’s statements at the meeting revealed “the depth of his intent to create a climate of racial intolerance within any unit.”

The CO stated that he was unaware of an command climate issues at the XXX during the applicant’s command. He found the applicant to have “exceptional integrity and openness to all issues with the utmost concern for all personnel without regards to race or sex. I cannot see how any person could have performed more admirably under the circumstance where the actions of [LT Y] were in direct opposition to Coast Guard policy and undertaken with what appears to be a personal agenda.” He stated that the applicant “should have been commended on his tolerance and patience in dealing with the issues of one individual.”

Statement of CDR U

CDR U, who met the applicant in May 2008, has a doctorate in organizational leadership, and was a department head in the Coast Guard’s Office of Leadership & Diversity for four years, stated that based upon his review of the evidence, he believes the applicant’s allegation that the mark of 4 and poor comments in the disputed OER resulted from the baseless complaints of two disgruntled subordinates and the undue influence of the OER Reviewer.

Note from a Discharged Member

The applicant submitted a photocopy of a note and coin that he received from a former member of the XXX whom he had had to discharge for alcohol abuse. The note states, “Sir: This is my one-year sobriety chip. Thank you for being the best CO I ever worked for. I present you this challenge coin.”

SUMMARY OF THE RECORD

On September 24, 1993, the applicant was commissioned an ensign in the Coast Guard Reserve. He served on extended active duty contracts and was promoted to lieutenant junior grade on March 24, 1995, and to lieutenant on March 24, 1998. He was integrated into the regular, active duty Coast Guard on April 8, 1998. The applicant reported to the XXX as the new CO on June 2, 2004, and was promoted to LCDR on July 1, 2004.

Before serving as CO of the XXX, the applicant held the following assignments during his career: Intelligence Watch Officer for air interdiction operations in Xxxx from September 1993 through March 1994; Assistant Group Communications Officer and Group Duty Officer for search and rescue, law enforcement, and other missions in Xxxx from April through September 1994; Assistant Law Enforcement Officer in Xxxx from October 1994 through June 1995; Narcotics and Intelligence Officer in Xxxx from July 1995 through April 1996; flight training student in Xxxxxx from May 1996 through January 1997 (unable to qualify); Officer in Charge of a Law Enforcement Detachment in Mayport, Xxxx, from February 1997 to June 1999; Deputy Group Commander at Xxxxxx, Xxxxxx from June 1999 to July 2002; Tactical Action Officer at a Joint Interagency Task Force from July 2002 to April 2003; Command Duty Officer and Air Bridge Denial Duty Officer at the task force from April 2003 through May 2004.

The applicant received many excellent OERs in these assignments. His numerical marks in the performance category “Workplace Climate,”⁷ rose from average marks of 4 when he was an ensign, to marks of 5 when he was a lieutenant junior grade, and to marks of 6 when he was a lieutenant. His marks on the comparison scale⁸ have been mostly 5s with two marks of 6 on his last two OERs as a lieutenant.

As CO of the XXX, the applicant was responsible for a unit with 80 active duty members, 22 reservists, 6 boats, and an annual budget of \$1.2 million. He was responsible for conducting safe and effective unit operations; for the material readiness of the boats and teams for all missions, including search and rescue, drug interdiction, and anti-terrorism/force protection; and for the promotion of personnel programs, including professional training, promotion and advancement opportunities, family and work-life support, and equal opportunity.

On the applicant’s first OER as the CO of the XXX, which covers the period June 1, 2004, to April 30, 2005, he received primarily marks of 6 in the various performance categories, but marks of 5 for “Teamwork” and “Workplace Climate,” and a mark of 5 on the comparison scale, denoting an “Excellent performer; give toughest, most challenging leadership assignments.” The Reporting Officer also gave him a “strong recommendation for promotion with peers.”

On the applicant’s second OER as the CO of the XXX, which covers the period May 1, 2005, to June 27, 2006, the applicant received primarily marks of 6 in the various performance categories, but one mark of 5 for “Workplace Climate,” and four marks of 7 (the best) for the categories “Results/Effectiveness,” “Professional Competence,” “Looking Out for Others,” and “Health and Well-Being.” The Reporting Officer assigned him a mark of 5 on the comparison scale and wrote that the applicant was “[r]ecommended for promotion to O-5.”

⁷ The category “Workplace Climate” first appeared on OER forms in 1998. However, prior OER forms (CG-5311) had two categories whose definitions were similar to that of “Workplace Climate”: “Work-Life Sensitivity/Expertise” and “Human Relations.” See footnote 2, above, for the official description of the performance category “Workplace Climate.”

⁸ See footnote 4, above, for an explanation of the comparison scale on an OER.

The applicant's third OER as the CO of the XXX is the disputed OER in this case and it covers the period June 28, 2006, to April 30, 2007. The marks and comments in this OER appear in the table below. The disputed marks and comments are shaded.

MARKS AND COMMENTS IN THE DISPUTED OER

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	6	Adroitly utilized preparation=performance theory. Focused on operational qualifications to ensure mission readiness. Deftly balanced competing demands with different parts of the unit dispersed for a myriad of operational tasking and/or training, kept the big picture throughout & comms flowing between departments. Justified & received 25 weapon increase in M9 allowance for unit to better respond to MARSEC II & III. Tasked unit engineers to fabricate 2 brackets out of on-hand metal for other units receiving the IAS/DIDSON, provided maximum flexibility to units. Achieved high marks on 4 unit inspections. Unit consistently achieved outstanding results and high praise from customers & port partners in the Area Maritime Security Committee, improved interoperability, adaptability & cooperation within the port to better respond to threats. Developed response techniques with Sector San Diego aircrews during Airborne use of Force certification process, results in more tactically sound & efficient Vertical Insertion & security evolutions. Continues to exhibit great breadth of knowledge in all tactical LE & MHLS areas. Briefed Sector commander on nuances of delegation of boat use of force, Sector commander requested XX approval to delegate to XXX coxswains, will result in quicker response time for coxswain/gunner to employ necessary level of force. Asked to provide input to Area & District program reps and xxxxx Ops Group staff.
3b	Using Resources	6	
3c	Results/ Effectiveness	7	
3d	Adaptability	7	
3e	Professional Competence	7	
4a	Speaking and Listening	6	Accomplished speaker in both planned & extemporaneous situations, inspired confidence in others. Provided XXX briefs to visiting House & Senate Staff Delegations, members of appropriations committee, GAO, reps from the National Counterterrorism Center, COMDT, CG-3, CG-3R. Gave speech at 2 Eagle Scout pinning ceremonies. Also an active listener. Drafted numerous memos, i.e., PSB support issues, tactical boot purchase waiver requests, 30 end of tour awards, special awards, all well0written, clear and concise. Shared grammar skills with subordinates.
4b	Writing	6	
5a	Looking Out for Others	7	Consistently led from the front maintaining focus on mission accomplishment with safety & mbr's needs primary. Wrote CAPT Edward R. Williams award for LTJG, mbr won the award & was recognized in D.C. at ceremony. Endorsed sports grant for unit athletes, saved precious training & travel money for members to pursue healthy off-duty pastime. Personally arranged for COMDT to present plaque to unit HS1 who was awarded HSOY for 2005, even ensured mbr's parents were able to attend the event. Fostered 14 advancements this period, trained the workforce of the future. Allowed XO to attend BO course, supported rating day at unit since unit mbrs often work outside of rate. Sent myriad mbrs TAD to cutters for professional development. Outstanding ability to lead others and work as a team as evident of the unit's operational successes, inter-agency cooperation & integration. Very broad network of MHLS & LE resource providers w/in xxxxxxxxxx, increases professional exchange, comms & effectiveness of XXXXXX agency response. Personally deployed for 30 days for xxxxxx op. Maximized the diversity of the crew, took quick action to stop insulting comments regarding accent of mbr of Russian descent. Encourages problem solving at all levels. Oversaw 133 enlisted evals, 9 OERs, well documented & timely.
5b	Developing Others	6	
5c	Directing Others	5	
5d	Teamwork	6	
5e	Workplace Climate	4	
5f	Evaluations	6	
6	Signature of the Chief of the Xxxxxx Area Shore Forces Management, dated April 6, 2007		
7	Reporting Officer's Comments	NA	[Concurred with Supervisor's evaluation.] "[The applicant] continues to stay on the cusp of changes w/in the XXX program & CG xxxxx Forces in general. Unquestionable tactical capabilities & focus for mission execution; they are among the best there is which often leads to him being consulted by working groups because of his tactical acumen. A dedicated & committed CO, yet his command has had numerous issues this past year with command climate that left some members of his command feeling alienated; he was proactive in trying to overcome/resolve the command challenges he faced.
8a	Initiative	6	Sought solutions to challenges from w/in, proactive w/ proposing changes that were clearly researched, as a result often had significant prgm influence. Offered dive resources to local cutters to save on husbandry costs/expand unit divers' experience, team earned outstanding rating by dive team inspectors. Forward leaning for integration of operations locally, increased unit professional exchange w/ XXX FBI SWAT, XXXPD, XXXSD, DHS partner agencies & DOD. consistently displayed excellent operational judgment w/ continual/focused drive to excel. Keen foresight led to his decision to leave key team members on board CGC XXXXXX during
8b	Judgment	5	
8c	Responsibility	6	

8d	Professional Presence	6	takedown of xxxxxxxxxx was cited by XX & cutter CO as reason they felt comfortable to proceed w/ high risk operation. Did not waiver [sic] under pressure; made tough decisions even when unpopular, though approach was viewed by some as inflexible. Outstanding military bearing & appearance exhibited in many public speaking engagements in front of visiting VIPs. Volunteered 6-8 hours/wk at local Marine Mammal Care Center. An avid athlete/triathlete, runs effective & challenging unit fitness/wellness prgm. Fitness of crew is excellent & contributed to operational effectiveness/safety.
8e	Health & Well-Being	7	
9	Comparison Scale	4	[This mark means that in comparison to all other LCDRs whom the Reporting Officer has ever known, the applicant ranked as a "[g]ood performer; give tough, challenging assignments."]
10	Potential	NA	Has excelled in all tactical aspects, setting a high bar for his crew; his command has achieved significant successes. I can think of few officers I would rather have leading a small, highly focused tactical team, or researching then developing program policy, or overseeing a compliance program. His focused ability to take on a problem, thoroughly research it, then develop a solution is excellent. An outstanding candidate & highly recommended for the most demanding staff positions, particularly where his tactical experience with operating a deployable unit is needed. He will be an invaluable asset for helping xxx [his next unit] achieve FOC where he has been assigned to fill an O-5 position.
11	Signature of the Chief of Xxxxxx Area Enforcement as the Reporting Officer, dated April 30, 2007		
12	Signature of the Chief of Xxxxxx Area Response as the Reviewer, dated May 1, 2007		

The applicant received an end-of-tour Commendation Medal upon leaving the XXX. The citation for the medal states that he demonstrated “the highest degree of professional competence and acumen” by “flawlessly [leading] the unit through 27 major deployments, including 319 underwater explosive detection dives and over 12,318 hours of security patrols in support of military outloads, disaster relief, law enforcement efforts, and public maritime events. ... His extraordinary aptitude and resolve was paramount to the creation of the first Xxxxxx Area xxxxxxxxxxxxxxxxxxxxxxxx, providing a ground-breaking capability to neutralize threats.” The citation also highly praises his vision, innovation, training programs, dedication, judgment, and devotion to duty.

Following his departure from the XXX, the applicant was assigned as the xxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxx. On his 2008 and 2009 OERs in this position, he has received all marks of 6 and 7 in the performance categories; a mark of 6 on the comparison scale, which means that in comparison with other LCDRs he is “[s]trongly recommended for accelerated promotion”; and his Reporting Officer’s recommendation that he be promoted ahead of his peers and assigned to a CO billet. The applicant was not selected for promotion to commander (O-5) by the selection board that convened in July 2008, but he was selected for promotion in July 2009.

VIEWS OF THE COAST GUARD

On April 15, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant’s requests.

The JAG stated that the applicant’s rating chain had primary responsibility for ensuring that he received a fair and accurate evaluation. Although the applicant argued that the mark of 4 he received for “Workplace Climate” is the erroneous product of a suggestion to the Supervisor from his Reporting Officer, the JAG argued that the Supervisor’s statement proves that the rating chain obeyed the rules of the Officer Evaluation System (OES) because the Reporting Officer asked the Supervisor to reconsider the mark of 5 he had assigned and whether that mark was adequately supported by the comments, which is a permissible request under the rules. Thus, the

JAG argued, it is clear that the Reporting Officer did not “direct” the Supervisor’s evaluation in the “Workplace Climate” category, which is prohibited by the rules.

The JAG alleged that the declarations of the Supervisor, which was submitted by the applicant,⁹ and of the Reporting Officer and Reviewer, which were submitted by the Personnel Service Center (see below), show that the rating chain complied with OES policy in completing the disputed OER and committed no legal errors or injustice. The JAG noted that the rules do not require that a Reporting Officer make a specific recommendation about promotion, and the Reporting Officer “confirms that his comments are accurate descriptions of the applicant’s performance and potential.” Therefore, the JAG argued, citing *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992), and *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), the applicant has not met his burden of proof because he has failed to prove that the disputed OER was adversely affected by a clear and prejudicial violation of a statute or regulation or a misstatement of significant hard fact.

Regarding the applicant’s failure of selection for promotion, the JAG argued that because the applicant has failed to prove that the disputed OER is erroneous or unjust, there are no grounds for removing his failures of selection.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the PSC. The PSC first noted that the applicant did not submit an application for correction of the disputed OER to the Personnel Records Review Board, which can correct OERs within a year of their validation by the PSC.

Regarding the mark of 4 for “Workplace Climate,” the PSC stated that a mark of 4 is not a negative mark and instead “describes the high level of performance expected of all Coast Guard officers.” The PSC stated that the comment in the OER that the applicant maximized the diversity of the crew and took swift action to stop insulting comments about a member’s accent supports the mark of 4 as such efforts are expected of the CO of a unit. The PSC alleged that there is no evidence that the Reporting Officer “directed” the Supervisor to lower this mark from a 5 to a 4, which would be contrary to OES policy.

Regarding the disputed comment in block 7 of the OER, in which the Reporting Officer referred to numerous command climate issues at the XXX, the PSC alleged that the comment is supported by the declarations of the rating chain and even by some of the statements submitted by the applicant.

Regarding the disputed comment in block 8 of the OER, in which the Reporting Officer stated that the applicant’s “approach was viewed by some as inflexible,” the PSC alleged that the Reporting Officer’s declaration supports the accuracy of this comment. The PSC also alleged that the comment “helps paint a complete picture of the applicant’s performance, especially in regards to the applicant’s inability to completely solve problems at his unit.” The PSC argued that the statements submitted by the applicant do not prove that this comment by the Reporting Officer is inaccurate or unjust.

⁹ The JAG also submitted a copy of the Supervisor’s declaration. The JAG’s copy has some extra information about the Supervisor but no changes in the paragraphs reproduced above beginning on page 2.

Regarding the applicant's request that the Reporting Officer reconsider his comments in block 10 and his mark on the comparison scale, the PSC stated that the Reporting Officer's declaration shows that he continues to believe they are accurate and that he intentionally omitted a recommendation either for promotion. The PSC alleged that the comments in block 10 comply with OES policy because the Reporting Officer recommended the applicant for "the most demanding staff positions" based on his tactical experience and that Reporting Officers are not required to include a recommendation either for or against promotion in block 10.

Regarding the applicant's request that the Reviewer be given another opportunity to add a page of comments to the disputed OER, the PSC stated that the Reviewer's declaration shows that he even in retrospect believes that the OER is a fair assessment of the applicant's performance during the evaluation period and that, if anything, the OER "errs on the side of generosity."

The PSC concluded that the disputed OER was properly prepared in accordance with the Personnel Manual and accurately documents the applicant's performance during the evaluation period. Therefore, the PSC also recommended that the Board deny the applicant's requests.

Declaration of the Reporting Officer for the Disputed OER

The applicant's Reporting Officer stated that as Chief of xxxxxxxxx for the entire xxxxxx Area, he was the Reporting Officer for the six xxx COs in the Area. He served in this role from July 1, 2006, to July 1, 2007, when he retired from active duty. He wrote the following regarding the applicant's performance during that period:

2. [The applicant] was a tough person to write about and critique because he got results and by most measures of success he was doing an outstanding job at xxx xxxxxxx. On one hand he is an outstanding officer and one whom I would gladly utilize if I had a tough problem to solve. He is focused, fully committed, and gets results through demanding standards that he universally enforces on those working for him. Standing up a new unit with a new mission such as the xxxs was a tough job and the performance of xxx xxxxxxx speaks to the excellent job [he] did getting the unit started. All that said, I standby the marks and comments in the Reporting Officer section of his 2007 OER, including his comparison scale mark in Block 9 and my comments in block 10.

3. Responses on specific relief requested in [the applicant's] BCMR application (his comments from the application are italicized):

a. [Regarding the request to raise the mark of 4 for "Workplace Climate"] — That is for the Supervisor to decide, but I will comment. I did talk to the Supervisor when I first read through the OER that I felt his initial mark for 5e was too high considering the issues that xxxxxxx staff had been dealing with over the past year at xxx xxxxxxx. It was his call to make and I would "concur" or "not concur" [with the Supervisor's marks] in block 7 as appropriate. I also advised the Supervisor that I did not think the Reporting Officer [sic¹⁰] would concur with the Supervisor's initial mark in 5e for the same reasons that I was concerned for the mark. It was his call to make though and he could do what he felt was appropriate.

¹⁰ As the author of this declaration was the applicant's Reporting Officer, he presumably meant the Reviewer.

b. [Regarding removal the disputed comment in block 7] — I recommend against it as the wording is a correct statement from my viewpoint. There were numerous members of his command that felt alienated because of his leadership style. They felt that he had two standards when it came to the value of people within his command and the importance they played on the unit's success. If you were a member of the tactical arm of the unit, you were treated better than if you were in a support role, particularly admin support. And he was very proactive in trying to overcome the issues. He cites numerous examples of what he did in this regard and I applaud his efforts, but I don't believe he was successful. He was sincerely looking for an answer, but did not realize that the answer was within him and his single mindedness when it came to how he treated people. My opinion is supported by the comments I received from both the XXXXXX and XX gold badges after their respective visits to the unit.

c. [Regarding removal of the disputed comment in block 8] — I recommend against it as the wording is correct and I believe it represents the crux of my concern for [the applicant's] leadership style; he was inflexible with his people yet he did not see himself being that way. I am of the belief that he never will. He views his style as being one of consistency and because of his consistent approach, he is a good leader. I don't agree and believe that being a good leader is more than leading with a single focused style. My experience over the years has been that single focused leaders have more problems within their commands than those who use a style that is more adaptive to the differences in people. One of the results of a single focused style, and I saw it at XXX XXXXXX, was you have a group within the unit that the singled focused style fits well with and those members have nothing but praise for the boss. The others in the unit feel a bit left out, or like they just can't quite make the "A" team. A good leader reads the people working for them and adjusts their leadership style to one that will encourage and bring out the best in a person and not everyone is the same. No doubt the challenge to a XXX Commanding Officer is significant because they are dealing with both highly trained tactical members of the unit and the more mundane admin support members. The other five XXXs were not immune to this problem, but their respective Commanding Officers did a better job of achieving a balanced leadership style that resulted in fewer (to none) complaints or issues being raised about command climate issues.

d. [Regarding the request for reconsideration of blocks 9 and 10] — In reading through the application submitted by [the applicant], the myriad of supporting statements, and past OERs I have reconsidered how I marked block 9 [the comparison scale] and the words I wrote for block 10 and see no reason to make a change. For block 9 the middle mark best fits his potential in my opinion. While he is an excellent performer and I would give him the toughest assignments, I do not agree that he is a good candidate for the "most challenging leadership assignments." For running a broad skill based unit where he must lead a diverse group of people I believe he would again have similar problems as XXX XXXXXX experienced. Since the more senior you are in the organization the bigger the units you are privileged to command with more diversity of people [sic]. Because of this I could not recommend him for a future command nor give him a mark that matches the wording for a 5 in block 9. Of the 6 XXXs that worked for me, XXX XXXXXX was the best tactically, but the most problematic one when it came to getting negative attention of the XXXXXX gold badge and Chief of Staff and it was all for what I would classify as command climate issues. I believe I correctly described his strengths and where the Coast Guard can best utilize his talent in block 10. It was my choice not to include a recommendation for advancement because I believe the role of leadership takes on an increasingly important aspect of one's role in the service as you advance to CDR and above. He is good people though and I did not feel justified to include any negative comments in block 10 about future commands or advancement, so made a conscious decision to not address either and focus my block 10 comments on where I thought his strengths lay.

Declaration of the OER Reviewer

The Reviewer, who was Chief of xxxxxxxxxxxxxxxxxxxx for the Xxxxxx Area from June 2005 through May 2007, wrote the following:

3. I was very familiar with [the applicant] and his unit. I feel, in retrospect, that the OER in question is both accurate and fair. I had every indication that [he] allowed serious command climate problems to persist at his unit, through either his own commission or omission.

a. During his final year in command, we (the XXXXXX staff) received several indications that the command climate at the unit was troublesome; the officer who filed the EEO complaint described in the BCMR appeal was one of those indications. We were aware of some of the issues before the OER period in question, had discussed them with [the applicant], and trusted him to manage them. As time went on, it became apparent that the problems were larger than we suspected and that more direction was needed. I had several discussions over a months-long period with [the applicant's Reporting Officer] and, to a lesser extent, [the applicant's Supervisor] regarding the situation and measures that we should take. These measures ultimately included visits by [MCPO A], XXXXXX CMC [Command Master Chief]; the Reporting Officer; and [MCPO B], xxxxxxxx CMC. I suggested [MCPO B], a female CMC, because we had indications that there was more than one female being treated unequally at the unit. We also recommended the Defense Equal Opportunity Management Institute survey.

b. The reports from the unit visits were unequivocal in stating that there were serious and pervasive command climate issues at the unit. While some members cited the old XO, [LT Y], as a source of problems, [the applicant] was 1) also cited as a source of problems; 2) responsible as CO.

1. After [MCPO A's] first visit, he reported never having visited a unit with so large a problem. JOs, CWOs, and CPOs unanimously voiced complaints that the climate was dysfunctional, that the CO and XO blamed each other for the problems, and that [the applicant] did not listen to their advice; rather, he maintained a "my way or the highway" attitude. I was TAD at the time, but my recollection is that [the applicant] was "invited" to XXXXXX the following day for an audience with the Chief of Staff. This began a period of heightened scrutiny and increasingly pointed direction.

2. [MCPO B] reported similar findings that included a climate of class warfare between the JOs, CWOs, and CPOs; and the females at the unit all said they were not treated fairly. Her assessment was that the enlisted members as a whole were "hurting" but afraid to speak up.

3. Both visits also noted that [the applicant] spent a lot of time away from the unit. To be fair, there was much training to be done as XXXXXX charged the unit with standing up the xxxx xxxxxxxxxxxxxxxx that [the applicant] refers to in the package, and his style was clearly to be personally out in front. While he succeeded tactically, his unit suffered from his absence. When he personally chose to deploy aboard ship for the 30-day operation to capture a xxxxxxxx at sea, I thought it an unusual thing for a CO to do, especially at a time when he was supposed to be dealing with difficult issues at the unit. When I asked [the applicant's Supervisor] why [the applicant] had done this, he told me that [the applicant] had said that it was because he "... did not trust any of his team leaders to do the job." I took this as a signal that the light had not gone on for [him], and relayed my concerns.

4. As we worked through the issues, the later visit reports indicated that the climate was improving as new members reported aboard, we recognized that [the applicant] had only a few months left at the unit, and therefore action to remove him as CO would cause more harm than good to the unit at that point in time. I also believed that the scrutiny and discussions that my staff had with [him] during this process had made him realize that he needed to take corrective actions, which he had failed to take on his own. When he departed, the issues were not resolved. My final act in this matter was to ensure that his relief was well prepared to deal with the issues that she inherited.

c. With respect to counseling [the applicant], I properly entrusted that to his Supervisor ... and Reporting Officer I am confident that they shared the chain of command's collective concerns during the months of unit visits and evaluations. I personally spoke with [him] informally during the CO's conference in March 2007, and indicated that, while he had serious issues, I was glad to see progress being made. The comments and marks on the OER should have come as no surprise to him.

d. With respect to the OER itself, while I discussed [the applicant's] performance with his rating chain throughout the period, I did not direct any numerical marks or comments in the OER.

4. [The applicant] suggests that it was a vocal, very few who were unhappy; I had several indications that this was not the case. [LT Z's] statement in the BCMR package outlines the climate issues that he saw as a new member of the wardroom. [The applicant] indicated in his memo to the XXXXXX Chief of Staff that it wasn't until months after [LT Y] departed the unit that he, the CO, discovered how bad [LT Y] was. Yet, [the statement of the CO of the XXX] indicates clearly why, a year before [LT Y] departed, [the applicant] had every reason to know that he had a serious problem with his XO; a problem which he either inexplicably failed to recognize or chose to ignore. Either way, [the applicant] was the CO and had a duty to take action. He failed in that duty.

5. I believe that the OER in question is a fair indication of the member's performance at the time. If anything, the OER errs on the side of generosity. [The applicant] was capable in many ways and accomplished much. The Reporting Officer's comments paint a picture of an officer adept at leading a small tactical team with a focused mission; however, a tactical expert and leader does not necessarily equate to a good CO. [The applicant's] failure to maintain a command climate that reflected our service's core values indicated that he was not prepared to lead a large unit such as he would command at the O-5/6 level. He as a hard worker and a meticulous problem solver when it came to tactics, procedures, and policy. I am not surprised these strengths have led to success in the staff job that he now fills.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 2, 2009, the applicant responded to the views of the Coast Guard. The applicant again asked the Board to contact the Office of Civil Rights about the EO complaint of a junior female officer at the XXX, LT X, which has not yet been decided. The applicant noted that he is powerless to get this evidence.

The applicant alleged that the Reporting Officer's actions in telling the Supervisor to reconsider the mark of 5 for "Workplace Climate" were improper as he denied the Supervisor the right to act independently as the OES requires. Moreover, regarding his failure of selection for promotion, the applicant alleged that the disputed OER clearly prejudiced his record.

The applicant denied the Reporting Officer's and Reviewer's claims that there were many command climate issues and alleged that the Supervisor was correct in stating that the "crux" of the problem was one unhappy female lieutenant, LT X. He explained that on May 3, 2006, the XO, LT Y, told him that LT X was unhappy with her comparison scale mark because it was lower than that received by a male lieutenant at the XXX. The applicant met with her and her rating chain on May 4, 2006, to discuss the issue. "She twice stated that her mark [on the comparison scale] was factually correct. Her desired outcome was to have her block 10 mark changed, that a command climate assessment be conducted, that her marks be raised in two specific areas ["Writing" and "Looking Out for Others"] in the supervisor's portion of the OER, that her name

be moved on the unit organizational chart, and that all unit personnel be afforded fair treatment. After block 10 was revised in response to her complaints, she “added to her list of demands that either she or I leave the command.”

On March 9, 2006, the applicant sought the advice of LT X’s prior CO. He submitted an email in which he stated he was having leadership challenges and communication problems with LT X and asked for advice in improving her performance. In response, the prior CO told him that LT X was neither a substandard officer nor the best performer. She stated that LT X was sometimes difficult to approach, had “limited views on what her job was,” and sometimes had to have the “big picture” explained to her, but was always willing to fill in by standing watch. She recommended that he find LT X a female mentor “to meet[] her touchy feely side.”

The applicant stated that on May 15, 2006, LT Y called the Area’s Office of Civil Rights and was told that a mediator would visit the XXX by the end of May and conduct a survey, but this did not happen. The applicant submitted an email from the Equal Opportunity Advisor (EOA) assisting LT X, in which the EOA indicated that after speaking with the applicant on the phone, he had spoken to the new Area Command Master Chief, MCPO A, who said that the XXX was “on his radar” to visit and that because of LT X’s complaint he would visit in about three weeks, which was earlier than he had intended. The EOA stated that he hoped that LT X would agree that her complaint could be resolved with the Area CMC’s visit and a Defense Equal Opportunity Management Institute (DEOMI) Organizational Climate Survey, which the applicant had agreed to have administered.

The applicant alleged that while he was on leave for a week in mid June 2006, LT Y called and told him that LT X had entered his office “in tears, stating that it was too stressful for her to remain at the unit.” Therefore, the applicant authorized that she be sent on temporary orders to another command.

On June 20, 2006, the applicant stated, his Reporting Officer, who was about to be transferred, emailed him and indicated that the Area CMC’s upcoming visit was unrelated to LT X’s complaint. The applicant submitted a copy of this email, in which the prior Reporting Officer told the applicant that he should not be concerned that the CMC was visiting the XXX while the applicant was away because it was the CMC’s only available time to visit for a while. The Reporting Officer stated that the CMC’s “major focus is usually on the CPO mess, so your presence or absence won’t have too much effect either way. ... It’s not an inspection—it’s a visit for the CMC to find out how things are going and to get to know your unit. Nothing to worry about.”

On June 21, 2006, the applicant stated, the CMC visited the XXX while the applicant was at a vertical insertion training (descending to a vessel from a helicopter) and most of the unit members were in operations away from the office. The CMC spoke primarily with a handful of disgruntled individuals. He spoke with LT Y, the XO, who questioned the applicant’s decision-making; LT G, the outgoing Operations Officer, who complained that the applicant was too involved with the management of the XXX; LT X; CWO R, who had an OER complaint; BMC R, who objected to the fact that the applicant had initiated the separation of another unit member

for being 71 pounds overweight; MSTC X; LT C; and LT E. The CMC also met with the officers as a group and with the few chief petty officers who were in the office as a group.

Later that day, the applicant received a call from his Reviewer, stating that he had to meet with the CMC and his Reporting Officer the next day. When the applicant met with them on June 22, 2006, the CMC "took an accusatory tone almost immediately and asked me questions." The CMC noted that the applicant had intentionally posted both the passing and failing physical fitness scores of the XXX's members and accused him of not trying to keep LT G from leaving the Service, even though LT G had already applied for a temporary separation before she reported to the XXX. The CMC also asked him why he did not let the XO, LT Y, handle more issues. The applicant alleged that throughout this session, his prior Reporting Officer sat idly by and did not stop the CMC from berating him, a LCDR. The applicant "strongly felt there was a hidden agenda and left feeling that I had been unjustly accused of improperly commanding the unit."

On June 26, 2006, the applicant alleged, he discussed the CMC's visit with LT Y, who said he claimed he had only met with the CMC once and neglected to admit that he had criticized the applicant to the CMC.

On July 6, 2006, he met with all of the officers at the XXX "to discuss any issues." On July 7, 2006, the EOA told him that LT X intended to file a formal complaint because the CMC's visit had not resulted in the applicant being relieved of command.

On July 10, 2006, the new XO took over from LT Y.

On July 11, 2006, the EOA told him that LT X wanted someone else from the XXXXXX to visit the command; an outside climate assessment survey of the XXX; and a permanent transfer from the XXX.

On July 12, 2006, he met with the XXX's chief petty officers to discuss any issues. On July 13, 2006, he met with members in paygrades E-6 and below to discuss any issues. He drafted a proposed resolution for LT X's complaint, but she refused to sign it.

The applicant submitted a copy of a "Resolution Memorandum" concerning LT X's complaint. He noted that comments in block 10 of her OER had been changed; that a command climate assessment would be completed; that an assessment would be conducted by Area personnel; and that she had been allowed to move her name on the organizational chart; but that LT Y had not agreed to raising her marks for "Professional Competence," "Writing," and "Looking Out for Others."

From July 14 to August 11, 2006, the applicant deployed on a cutter to "effect an at-sea capture of the leaders of the xxxxxxxxxxxxxxxx drug cartel."

The applicant submitted copies of emails concerning LT X's complaint, including one from the new Executive Officer, stating that LT X was unwilling to accept and sign the resolution

he had proposed and that her complaint would be formal. The email shows that LT X had been temporarily assigned to another unit and was seeking a permanent transfer.

On August 15, 2006, the applicant alleged, reviewed the results of the DEOMI on-line survey, which had been conducted in July 2006 at his request. The results “revealed no issues,” and there were both negative and positive comments in the written comments section. He forwarded the results to his Supervisor and the Office of Civil Rights.

On August 18, 2006, the applicant met with an EOA in the Office of Civil Rights to discuss LT X’s complaint and the results of the DEOMI survey. He alleged that, “[n]o widespread issues were identified, but some areas to work on were noted.”

On September 15, 2006, the applicant sought the advice of his former CO at Group Xxxxxxx because she had previously served as a Coast Guard Gender Policy Advisor. She recommended that MCPO B, who had also worked in the Office of Gender Policy, visit the XXX. The applicant asked his Supervisor to arrange the visit, which was scheduled for November 6, 2006. He submitted copies of emails concerning the arrangements for the visit.

In the first week of October 2006, the applicant alleged, a female crewmember, GM2 S, told him that LT X “had approached her and tried to pressure her into filing a complaint against me.” The applicant submitted a copy of an email from the XO dated October 6, 2006, in which the XO wrote that he had heard rumors that GM2 S was complaining about not being recommended for advancement and about the command not supporting equal rights for female members at the XXX. When the XO confronted her, GM2 S denied saying these things and complained that LT X had asked her to support a claim against the command. When the XO informed the Office of Civil Rights about this, he was told that LT X’s conduct was wrong, but they took no action against LT X for harassing GM2 S.

On October 27, 2006, the applicant’s new Reporting Officer visited the unit. He attended quarters, observed the operations brief, inbriefed with the Command Senior Chief, met with E-4s, E-5s, E-6s, and chief petty officers in separate groups, and outbriefed with all the officers. He held a request and complaint mast for individuals and, at quarters with all hands present, said that “we have a good thing going here” at the XXX.

On November 7, 2006, MCPO B visited the unit. The applicant referred the Board to the new XO’s characterization of this visit in his statement on the applicant’s behalf.

On January 23, 2007, MCPO A visited the unit again. The applicant referred the Board to the new XO’s characterization of this visit in his statement on the applicant’s behalf.

On March 23, 2007, the applicant alleged, a contract EO investigator completed her report about her investigation into LT X’s complaint.

On March 29, 2007, the applicant alleged, he spoke with his Reporting Officer at a regional CO conference for about five minutes. The Reporting Officer did not mention the appli-

cant's upcoming OER for the period ending April 30, 2007, and did not refer to his performance as a CO.

The applicant stated that during the first week of April 2007, the XXX underwent a regular "Unit EO Review," which every unit undergoes "over a multi-year cycle." The applicant alleged that his oral outbrief with the EOA from the Area Office of Civil Rights was positive, and the unit never received a formal report.

The applicant alleged that Coast Guard Headquarters "signed off on the EO formal complaint investigation report" on April 16, 2007; the Area Chief of Staff signed off on it on April 27, 2007; and his Reviewer received it on May 1, 2007.

On May 10, 2007, the applicant alleged, his Supervisor sent him a copy of the disputed OER. He called the Reviewer, discussed it with him, and sent him an email about it.

On May 24, 2007, the Office of Civil Rights allowed him to read the investigator's report, which included a summary of the specific complaints against him and a collection of statements taken by the investigator, including his own. He was not shown any opinion or endorsements to the report. The applicant noted that although under the rules, DHS must take final action on such a report within 180 days, to his knowledge no action has been taken even though more than two years have passed since the report was issued. The applicant stated that this delay "has been deeply prejudicial to my career for no valid reason."

Regarding his Reporting Officer's declaration, the applicant alleged that it shows that he did not understand that the tactical members and the support sides of the XXX were not mutually exclusive because, as shown by the dual roles of many of the members who submitted statements on his behalf, many members who held supporting roles also served in tactical roles. He alleged that it is unfair and erroneous to state that he could not lead a diverse unit because the overwhelming majority of the members of the highly diverse XXX were happy under his leadership. Moreover, he stated, unlike the CO of a cutter who can always observe his crew, the CO of an XXX has to train his teams and trust that they will do the right thing out in the field.

The applicant alleged the Reporting Officer's criticism of his month-long deployment was unfair because he was away from the XXX for less time than either his predecessor or successor and his decision was not take lightly. The applicant stated that at the end of May 2006 more than a quarter of the XXXX transferred, including the senior enlisted leadership, and the cutter involved in the operation had only one qualified xxxx officer. The mission was to capture a xxxxxxxx wanted for the murders of 20 people, including law enforcement personnel and he was known to have trained assassin squads and to be surrounded by his own security force. The acting team leader of the XXXX, MST1 F, asked him to lead the team in his stead. Therefore, he agreed to the deployment, knowing that he had a good new Operations Officer and a good new XO to oversee the XXX in his absence.

Regarding the Reviewer's statement, the applicant alleged that he did not speak to the Reviewer during the CO's conference; he spoke to the Reporting Officer, and the topic was LT Y. He alleged that his successor denied that she had encountered any command climate issues at the

XXX or that the Reviewer had said anything to her about them. The applicant alleged that LT Y outwardly disagreed with him on only two occasions, one of which was described in CDR S's statement regarding the XXX and the other concerned an OER and a personality conflict between LT Y and a subordinate officer. The applicant argued that the Reviewer's statement regarding his leadership cannot be reconciled with his record of successfully leading an XXX with 100 active duty and reserve members. The XXX was the only Area XXX required to have either an XXXX or an Integrated Anti-Swimmer system, but they did so without any additional people to support the programs.

The applicant also submitted more statements with his response to the views of the Coast Guard.

Statement of BMI B

BMI B praised the applicant's leadership. He noted that he had heard that some people had said negative things to an MCPO who visited but most of the unit was deployed that day and so did not attend the meeting.

Statement of the Senior Reserve Officer

The Senior Reserve Officer at the XXX from July 2003 to August 2008 stated that the applicant "set a climate of patriotism, preparedness, and professionalism. He consistently deluged the ward room with email messages and regular updates at reserve all-hands with what he thought needed fixing, what he was doing about it and how these changes would affect reserve training and integration. ... His devotion to support unit integration to ensure Reserve forces were trained and qualified to fulfill domestic and military mobilization for operational readiness set a productive and forward thinking tone. ... [H]e encouraged a climate in which every member had the opportunity to develop and broaden their qualifications and promote their experiences as opportunities to develop qualified personnel eager to serve."

Statement of the Prior CO of the CGC Xxxxxx

LCDR X, who was the CO of the cutter on which the XXXX deployed to capture the xxxxxxx in July and August 2006, stated that all of the cutters involved were assigned a trained XXXX "as a force multiplier and to mitigate potential risks." He stated that he "found it beneficial to have on board another senior officer [the applicant], more familiar with XXXX training and capabilities, to assist with mission planning and managing overall operational safety for the inherently risk laden evolution." The applicant's XXXX integrated seamlessly with the crew of the cutter and greatly assisted in training the crew in advanced law enforcement tactics. After the training operations, two members of the applicant's XXXX remained and were still on board on August 14, 2006, when the cutter stopped the suspect vessel and apprehended the cartel xxxxxxx. Their presence "was critical to the overall successful outcome."

Statement of the CO of Another XXX

The CO of an XXX based in Xxxxxx stated that some of his crew had worked for the applicant and they “never had anything but highest praise” for his leadership. The applicant had told him about “the group of disenfranchised members on his Team.” One of that group was BMC R, whose problems were well known among the boat community. The CO later heard that BMC R was one of the most vocal complainers when MCPO A visited the applicant’s XXX.

The CO stated that he visited MCPO A’s office in July 2006, the MCPO told him about his concerns about the command climate at the applicant’s XXX based on his discussions with the crew. MCPO A stated that his impression was that there was a hostile work environment at the XXX and that the applicant was a self-serving leader who sought the limelight. The CO strongly denied this and reminded him that BMC R had also created problems in Xxxxxx. MCPO A asked him why the applicant had gone to vertical insertion training and was then on a long deployment. The CO told him that the applicant’s team leaders had just transferred so his deployment was necessary and that the applicant had gotten the approval of his chain of command. The CO stated that in March 2007, MCPO A acknowledged that the applicant’s XXX had responded to his concerns and comments about command climate. Finally, the CO noted, that in the feedback he himself received from his supervisors, the applicant’s XXX “was always the standard by which the rest of the XXXXXX XXXs were measured. While there were perceptions about command climate concerns at his unit, [the applicant] addressed them successfully, as expressed to us in subsequent CO working conferences.”

APPLICABLE LAW

Article 10.A. of the Personnel Manual governs the preparation of officers’ OERs. Article 10.A.1.b.1. states that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Every officer normally has a “rating chain” of three senior personnel, including a Supervisor, a Reporting Officer, and a Reviewer. Personnel Manual, Article 10.A.2.e.1.e. Article 10.A.1.c.4. states that the Supervisor is “[n]ormally, the individual to whom the Reported-on Officer answers on a daily or frequent basis and from whom the Reported-on Officer receives the majority of direction and requirements.” The Reporting Officer is normally the Supervisor’s supervisor, and the Reviewer is normally the Reporting Officer’s supervisor.

Article 10.A.2.d.2.a. states that it is the responsibility of the Supervisor to evaluate the reported-on officer in the execution of her duties and to prepare the Supervisor’s portion of the OER form.

Article 10.A.2.e.2.a. states that it is the responsibility of the Reporting Officer to evaluate the reported-on officer based on direct observation, reports of the Supervisor, and other reliable reports and to prepare the Reporting Officer’s portion of the OER form. Article 10.A.2.e.2.c. states that an Reporting Officer

[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 Supervi-

sor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer may not direct that an evaluation mark or comment be changed.

Article 10.A.2.f.2.a. states that the Reviewer "[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential." Article 10.A.2.f.2.b. states that the Reviewer "[a]dds comments as necessary, using form CG-5315 (series), that further address the performance and/or potential of the Reported-on Officer not otherwise provided by the Supervisor or Reporting Officer." Article 10.A.2.f.2.c. states that the Reviewer "[e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer may not direct in what manner an evaluation mark or comment be changed."

Article 10.A.4.c.4. instructs Supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 10.A.4.c.7. for Reporting Officers, who complete the rest of the OER, except for any comments the Reviewer may choose to add on a separate page):

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

• • •

d. In the "comments" block following each evaluation area, the Supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a four. The Supervisor shall draw on his or her observations, those of any secondary supervisors, and other information accumulated during the reporting period.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

• • •

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. ...

Article 10.A.4.c.6.a. states that block 7 of an OER

provides an opportunity for the Reporting Officer to comment on the Supervisor's evaluation. Although this section is not mandatory, Reporting Officers are encouraged to cite other information and observations they may have which would confirm or provide another perspective of the Reported-on Officer's performance and qualities demonstrated during the reporting period. By doing so, the Reporting Officer gives a more complete picture of the Reported-on Officer's capabilities.

Article 10.A.4.c.8.a. instructs the Reporting Officer to complete the comparison scale on an OER by filling in the circle that most accurately reflects his or her ranking of the reported-on officer in comparison to all other officers of the same grade whom the reporting officer has known. Article 10.A.4.c.9. states that in the comment block titled “Potential,” the Reporting Officer “shall comment on the Reported-on Officer’s potential for greater leadership roles and responsibilities in the Coast Guard.”

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 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.¹¹

3. The applicant alleged that certain marks and comments in the disputed OER are both erroneous and unfair. The Board begins its analysis by presuming that the disputed OER in an applicant’s military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.¹² Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.¹³ To be entitled to relief, the applicant cannot “merely allege or prove that an [OER] seems inaccurate, incomplete or subjective in some sense,” but must prove that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.¹⁴

4. The applicant alleged that the mark of 4 he received for “Workplace Climate” is erroneous and unfair. He noted that he has received higher marks in this category on prior OERs. He also submitted many statements from subordinates and colleagues who highly praised his leadership at the XXX. He attributed the complaints to LT X, a female subordinate who filed

¹¹ See *Steen v. United States*, No. 436-74, 1977 U.S. Ct. Cl. LEXIS 585, at *21 (Dec. 7, 1977) (holding that “whether to grant such a hearing is a decision entirely within the discretion of the Board”); *Flute v. United States*, 210 Ct. Cl. 34, 40 (1976) (“The denial of a hearing before the BCMR does not *per se* deprive plaintiff of due process.”); *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

¹² 33 C.F.R. § 52.24(b); see Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

¹³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

¹⁴ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

a formal complaint;¹⁵ to LT Y, the old XO, who did not inform him of problems and created others; and to BMC R, a long disgruntled member. His Supervisor apparently agrees that LT X was the crux of the problem. The Board finds, however, that the applicant has not refuted the statements of the Reporting Officer and Reviewer who stated that numerous problems with the command climate were found by the Area personnel who visited the XXX several times in 2006 and 2007 to assess the command climate. Although there were apparently very few members present when MCPO A first visited the XXX in June 2006, the same claim was not made regarding the subsequent visits. Moreover, the applicant's affiants are all male and all successfully engaged in the tactical operations of the XXX's mission, which the rating chain has stated was highly successful but also the beneficiary of the applicant's perceived favoritism as CO. In addition, the Board notes that many of the statements submitted by the applicant mention command climate problems although the affiants did not attribute those problems to the applicant's leadership as CO of the XXX. Finally, the Board notes that although the applicant had previously received 5s for "Workplace Climate" at the XXX, the mark of 4 is not a negative mark but merely an average mark, reflecting the expected standard of performance. Given all of the evidence in the record, the Board is not persuaded that the mark of 4 for "Workplace Climate" is erroneous or unjust.

5. The applicant alleged that his Supervisor improperly lowered his mark for "Workplace Climate" from a 5 to a 4 upon the improper suggestion of his Reporting Officer. However, Article 10.A.2.e.2.c. of the Personnel Manual specifically allows a Reporting Officer to ask a Supervisor to reconsider marks and comments that he believes to be inconsistent with actual performance. The Supervisor's declaration on behalf of the applicant clearly shows that he was not directed to lower the mark but was asked to reconsider it in light of the command climate problems at the XXX, and he chose to lower the mark from 5 to 4. The Board finds that the applicant has not proved that his rating chain violated the Personnel Manual in this regard or that the mark of 4 was improperly assigned by the Supervisor.

6. In light of the evidence of several command climate problems at the XXX, the Board finds that the applicant has not proved that the Reporting Officer's comment in block 7 of the disputed OER, which is quoted on page 2 above, is erroneous or unjust. The applicant submitted supportive statements from many members of the XXX who highly praised the applicant and either did not notice command climate issues or noticed them but attributed them to a disgruntled few or to the old XO. However, the applicant's Reporting Officer and Reviewer received the verbal or written reports of the visits of MCPO A and MCPO B and the results of the command climate surveys, which are not in the record, and they could also compare the command climate issues at the applicant's XXX with those of other XXXs in the Xxxxxx Area. Their determination that there were many substantive command climate problems and alienated personnel at the XXX and their belief that those problems could at least in part be attributed to

¹⁵ The applicant asked the Board to seek the report of the investigation and decision on LT X's EO complaint. However, the Reporting Officer stated that there were "numerous" command climate issues at the XXX, and the Reviewer stated that "females at the unit all said they were not treated fairly" and that the "enlisted members as a whole were 'hurting' but afraid to speak up." LT Z, the Operations Officer, stated that the officers and chiefs at the XXX were bickering and degrading each other; LT C stated that "the Wardroom and Chiefs' Mess experienced more than its fair share of division/conflict"; and GMC X stated that the applicant "[o]n face value ... favored certain divisions over other divisions." Therefore, even if LT X's complaint was found to be baseless, such a finding would not undermine the validity of the disputed marks and comments in the OER.

the applicant's leadership as CO are not adequately refuted or undermined by the many statements submitted by the applicant. Nor does the Board find that the comment is overly vague or incomplete given the limited space for written comments on an OER form. In elaborating the XXX's "Workplace Climate" issues, the disputed comment clearly meets the requirements for block 7 comments provided in Article 10.A.4.c.6.a. of the Personnel Manual.

7. The applicant alleged that the comment in block 8 that "some" thought his approach was inflexible is too vague, unfair, and prejudicial. The Board finds that it is slightly vague in that the "some" are not identified, but being slightly vague in this way does not bar a comment from inclusion in an OER. Comment space on an OER form is limited, and Article 10.A.4.c.7. requires a Reporting Officer's written comments to "identify specific strengths and weaknesses in performance" and to be "sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area." The Board finds that the comment about the applicant appearing inflexible to some meets these requirements. In addition, the Board notes that the comment was apparently intended to support the mark of 5 the applicant received for "Judgment," and both the Reporting Officer and Reviewer clearly had concerns about the applicant's judgment regarding his own role as CO of the XXX and his treatment of the tactical members of his command versus those members who worked only in supportive roles.

8. The applicant asked the Board to give the Reporting Officer and Reviewer an opportunity to revise his comparison scale mark and write new comments concerning his potential for command and leadership at the next higher rank. The declarations of both officers indicate that they continue to believe that the disputed OER is accurate and fair as written. Therefore, the Board concludes that there is no reason to ask them to revise the OER.

9. The applicant has not proved by a preponderance of the evidence that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors "which had no business being in the rating process," or a prejudicial violation of a statute or regulation.¹⁶ Because the Board has found no error or injustice in the disputed OER, there is no basis in the record for removing his failure of selection for promotion in 2008 or for backdating his date of rank.

10. Accordingly, the applicant's requests should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹⁶ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

