

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-230

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

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 upon receipt of the applicant's completed application and military records on August 20, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 13, 2010, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his record by modifying the language in a punitive letter of admonition (punitive letter) and by modifying an officer evaluation report (OER) for the period from June 1, 2008 to May 31, 2009 (disputed OER) by raising four marks and deleting certain comments.

BACKGROUND

During the period covered by the disputed OER, the applicant was the Work Life supervisor for the [REDACTED] [REDACTED] as well as the [REDACTED] collateral duty Morale Officer and the District [REDACTED] Morale Funds Custodian.

On April 7, 2009, the applicant's commanding officer (CO) issued a punitive letter to the applicant as non-judicial punishment (NJP) for violating Article 133 (conduct unbecoming an officer) of the Uniform Code of Military Justice (UCMJ). The punitive letter stated the following, in part:

[Y]ou are hereby admonished for your conduct while serving as the collateral duty morale officer at [REDACTED] [REDACTED] from January 2008 to April 2009. You behaved in a reproachable manner in that you engaged in an inappropriate, extramarital affair with a married woman whose acquaintance you made during

official travel. You used your position as the collateral duty morale officer to develop this relationship and arrange liaisons with this woman during official temporary duty travel. You used government phones and computer systems to carry on inappropriate communications that ultimately resulted in this woman's spouse submitting a complaint to Navy and Coast Guard investigators. I find your actions meet the elements of Article 133 of the [UCMJ], Conduct Unbecoming of an Officer.

The applicant acknowledged receipt of the punitive letter and his right to appeal the NJP and punishment.

Disputed OER

The disputed OER described the applicant's primary duty as the Work Life Supervisor and his collateral duties as the Morale Officer and the [REDACTED] Morale Funds Custodian. This block also noted that the "OER was submitted under Article 10.A.3.c.1. due to NJP on 7 [April] 09 for violation of UCMJ Article 133 (Conduct Unbecoming an Officer). Awarded a Punitive Letter of Admonition." The punitive letter was attached to the disputed OER.

The applicant's rating chain consisted of the supervisor, the reporting officer (who was the executive officer) and the reviewer (who was the CO). Each member of the rating chain was responsible for completing a specific portion(s) of the OER.

1. The applicant's supervisor was responsible for evaluating him in the performance of duties, communication skills, and leadership skills categories of the disputed OER. The supervisor assigned the applicant marks of 5 and 6 (out of a high of 7) in the dimensions of these categories. The comments were very positive.

2. The reporting officer evaluated the applicant's performance in the personal and professional qualities area in Block 8, rated the applicant on comparison with others of the same grade the reporting officer has known in his career in Block 9, and assessed the applicant's potential for greater leadership roles and responsibilities in Block 10.

In the personal and professional qualities area of the disputed OER, the reporting officer gave the applicant a 5 in initiative, a 2 in judgment, a 3 in responsibility, a 4 in professional presence, and a 6 in health and well being. In the comment section of Block 8, the reporting officer wrote the following:

Failed to use good judgment in development of inappropriate relationship; wrongly used position as MWR officer to further relationship during TDY travel; awarded Punitive Letter of Admonition as result of NJP. Willingly accepted responsibility of actions, showed true remorse for poor decision & continued to actively participate and contribute as staff member at [REDACTED]. Good initiative with creation of fitness go-bags for TDY personnel; offered equipment and instructions on exercise & nutrition for traveling personnel. Key coordinator for highly

successful 2009 [REDACTED] diversity day celebration utilizing creative talents of local college students. Facilitated senior training on leadership self-assessment & EEO procedures. Utilized extensive [REDACTED] training to serve as PST Leader during [REDACTED] response. While inappropriate relationship not in alignment with CG core values, for most of period was strong advocate for community involvement; recognized for effort as Boy Scout Leader, Coach, referee, and church youth group leader with Outstanding Volunteer Service Medal. Coordinated [REDACTED] program and [REDACTED] military diversity campaign showcasing diverse military staff. Impeccable personal appearance; serves as standard for military grooming.

On the comparison scale in Block 9, the reporting officer rated the applicant as a “fair performer who is recommended for increased responsibility,” which is the third lowest block of seven.

In Block 10, the reporting officer did not recommend the applicant for promotion. He described the applicant’s potential as follows:

[The applicant] is well aware that the consequences of his actions and resulting NJP will significantly impact his career. Based on his overall performance and his observed performance following NJP, I am confident [the applicant] will continue to contribute to the success of the Coast Guard, both as a staff member of the [REDACTED] and as a future Health, Safety, and Work Life supervisor (post-modernization), but he will need to demonstrate the ability to make better decisions without oversight to gain my recommendation for promotion to O-4.

3. The CO, who was the reviewer, authenticated the disputed OER on June 18, 2009 and did not attach any comments.

ALLEGATIONS

Punitive Letter

The applicant alleged that the following two sentences should be removed from the punitive letter: “You used your position as the collateral duty morale officer to develop this relationship and arrange liaisons with this woman during official temporary duty travel. You used government phones and computer systems to carry on inappropriate communications . . .” He argued that he was never charged with or convicted of any misuse of official government funds and that all of the TDY travel was reviewed and approved by his CO. With respect to the use of the telephone and computer to carry on inappropriate communications, the applicant stated that he continued using his cell phone, as he was never ordered to return it. He stated that his text messaging did not violate formal policy. Therefore, the disputed comments should be removed from the punitive letter.

Disputed OER

The applicant alleged that the mark of 2 in the judgment dimension should be raised to a 4. The applicant provided a list of accomplishments that he believes demonstrates that he should have a higher mark in judgment. He mentioned such accomplishments as volunteering and deploying as leader of the Personnel Support team for Hurricane Ike and serving as the Critical Incident Stress Management team leader. He stated that he recommended individuals on both of these teams for awards which were approved by the CO. He noted that his supervisor received a Coast Guard Commendation Medal for service as Chief, Personnel Division in part for her support of the Personnel Support Team while deployed in response to Hurricane Ike. The applicant concluded: “If I was unable to make sound decisions, did not risk cost and time considerations, and unable to demonstrate common sense and analytical thought¹ how were my subordinates and supervisors formally recognized for their participation . . . while I received a mark of two while as the [Personnel Team Leader] in addition to my primary and collateral duties.”

The applicant alleged that the mark of 3 in the responsibility dimension should be raised to a 4. In this regard, the applicant stated that he discovered and investigated irregularities in the use of a government credit card by one of his staff. The member admitted to the misuse and was appropriately disciplined. He stated that in addition to other duties, he was a stakeholder in the [REDACTED] modernization plans that included becoming the Health Safety Work Life (HSWL) Field Office Supervisor, rewriting unit instructions, standard operation procedures and other documents. The applicant concluded this portion of his statement with the following: “Before, during, and after the administrative investigation as well as during the entire performance period, my supervisor, the executive officer, nor the commanding officer ever reduced my primary and collateral responsibilities. In fact, my responsibilities increased significantly with an increase in my overall performance and outcomes . . .”

The applicant alleged that the mark of 4 in the professional presence dimension should be raised to 5. He stated that in addition to his other duties, he volunteered to serve in a number of capacities that “bring credit to the Coast Guard through one’s actions . . .” He stated that the CO asked him to serve in other capacities, such as the representative for the Combined Federal Campaign and the Coast Guard Representative on the Federal Executive Committee’s Workforce Diversity Council. He volunteered to assist with First Book, Boy Scouts of America, and youth groups at a local church. The applicant stated that he received the Outstanding Volunteer Service Medal from his CO and he was a recipient of the 2009 Excellence in Government Award, Community Service Team Category by the [REDACTED] Federal Executive Board.

¹ The applicant essentially restated the general criteria on the OER form for evaluating an officer’s judgment, which is the “[a]bility to make sound decisions and provide valid recommendations by using facts, experience, political acumen, common sense, risk assessment, and analytical thought.” The criteria for a mark of 4 in judgment on the OER form is “[d]emonstrated analytical thought and common sense in making decisions. Used facts, data, and experience and considered the impact of alternatives and political realities. Weighed risk, cost and time considerations. Made sound decisions promptly with the best available information.” See OER form, CG-5310B (Rev. 02-09).

Last, the applicant alleged that the Block 9 comparison scale mark should be raised from “fair performer” to the next higher category “good performer” and that the comment “not recommended for promotion” should be removed from block 10. The applicant stated that during the period of the disputed OER, he was given assignments of greater responsibility, such as Personnel Support Team Leader and the Coast Guard representative on the ██████████ Federal Executive Board. He argued that it was a contradiction for the reporting officer to say that he was a “fair performer” and “not recommended for promotion,” but find him capable of assuming the additional responsibility of becoming a HSWL Field Office supervisor which included managing a medical clinic, an administrative staff, and a legacy civilian Work Life department. The applicant stated that most of the HSWL field office supervisors are O-4s. He stated that the OER does not mention his pursuit of a Masters in Business Administration and his 3.4 GPA.

The applicant asserted that the CO’s personal feelings and subjectivity toward his inappropriate action resulted in several egregious errors in the punitive letter and the disputed OER. He stated that the CO never took into account his overall performance for the entire period, but approved the disputed OER based upon a single incident.

The applicant submitted several email newsletters the CO sent to MLC District ██████████ setting out ██████████ issues and accomplishments. Several of these reports mention travel by the applicant.

The applicant submitted a statement from his supervisor for the disputed OER. She stated the following:

Upon taking the job as the MWR officer at ██████████ [the applicant] took the initiative to develop more robust programs and establish an ITT office to meet the needs of the Coast Guard members and federal employees in the area. Having personally served as the MWR officer there for a year prior to [the applicant’s] arrival, I can tell you that many members strongly desired that more tickets and services be made available than the one amusement park discount that was offered. After months of research and interaction with the CG MWR Program Manager, [the applicant] approached the ██████████ command with a solid plan to establish an ITT office, which was approved. Over the last two years, [the applicant] was able to offer military, retired, and federal employees discount tickets to over 40 attractions in addition to being able to book much requested Disney cruises all while generating revenue for ██████████’s morale account. As his supervisor, I received a lot of positive feedback on the services and as a part of his duties allowed him to attend the annual MWR and ITT conferences, which was entered into our budget for the command to review. I don’t feel the applicant misused funds doing a job that he was authorized to do and his trips were noted in monthly summaries provided to the command.

During this period, even when an investigation was ongoing, [the applicant] was consistently called upon by me and the command to take on additional duties. He was critical to the successful deployment of a personal support team to assist displaced military and family members following Hurricane Ike and responsible

for heading the transformation process for his work life staff. In addition he continued to serve as the civil rights officer, webmaster, CFC campaign representative and was asked to take on new duties such as the [REDACTED] Federal Executive Board Diversity representative which he performed admirably.

There is no doubt that [the applicant] demonstrated poor personal judgment with an inappropriate relationship that brought discredit to the Coast Guard with its reporting to the Coast Guard Investigative Service by a civilian spouse. He has never disputed that fact. When I informed [the applicant] that he was under investigation he expressed true remorse for his indiscretion. I was impressed with [the applicant's] immediate desire to take responsibility for his personal actions and determination to not let the investigation or outcome affect his work . . .

During the OER period being reviewed, [the applicant] did his job and did it well. In my 21 years of service he is not the only officer I have known to commit a personal indiscretion and he is paying both a personal and professional price. However, I believe the OER being reviewed focuses too much on that one incident and does not take into account his entire performance for the period and should be corrected.

VIEWS OF THE COAST GUARD

On January 12, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request based upon the memorandum from Commander, Personnel Service Command (PSC). PSC noted that despite the supervisor's positive comments about the applicant's performance of duties, the challenges to the marks and comments on the disputed OER are all in the reporting officer's portion of the disputed OER and were reaffirmed by him in a recent letter to PSC. In that letter, the reporting officer stated that all the positive accomplishments identified by the applicant were considered in his evaluation of the applicant's performance. The reporting officer's letter further stated that the NJP aside, "the applicant's achievements and performance this period were not remarkable," and that "If anything, [the applicant's] final marks were higher, not lower, than what was merited based on his performance." The reporting officer stated that taking everything into account, "a mark of 3 ("Fair performer: recommended for increased responsibility") was the correct mark in block 9 (Comparison scale)." PSC stated that the reporting officer's comments justified the disputed marks in the reporting officer's portion of the disputed OER.

With regard to the applicant's contention that the CO's personal feelings and subjectivity towards his inappropriate action led to the creation of several errors in the disputed OER and punitive letter, PSC stated that based upon affidavits obtained from the rating chain the applicant's allegations are inaccurate. In this regard, the supervisor stated, "There is no doubt that [the applicant] demonstrated poor personal judgment with an inappropriate relationship that brought discredit to the Coast Guard with its reporting to the Coast Guard Investigative Service by a civilian spouse." PSC quoted the following from the reviewer's statement: "While I agree with the positive action [the applicant] listed in his BCMR request, I continue to support and approve the marking official's marks." PSC further stated that if the reviewer thought the OER

was inaccurate or the comments were not substantiated, he had the option to either, submit a reviewer's page to reconcile any discrepancies or return the OER to the reporting officer for additional information and/or clarifying comments. PSC noted that the reviewer stated that he remained confident that his NJP decision was accurate, appropriate and fair, and that the marking official accurately evaluated the applicant's performance and potential.

PSC stated that overall the disputed OER is positive and highlights many of the applicant's accomplishments and that the mark on the comparison scale and the substandard marks are only for those areas in the reporting officer's portion of the OER where the applicant's performance fell below standard. PSC stated that the comment—"Based upon his overall performance and his observed performance following NJP, I am confident [the applicant] will continue to contribute to the success of the Coast Guard both as a staff member of the [REDACTED] and as a future Health, Safety and Work Life supervisor . . . but he will need to demonstrate the ability to make better decisions without oversight to gain my recommendation for promotion to O-4"—reemphasizes that with time and positive performance, the applicant has the potential to perform at a higher level.

With respect to the applicant's request to remove the following language from the punitive letter, "You used your position as the collateral duty morale officer to develop this relationship and arrange liaisons with this woman during official temporary duty travel. You used government phones and computer systems to carry on inappropriate communications," PSC stated it presumes that the statements are factual based upon the comments in the reviewer's affidavit. The reviewer stated that "cell phone and cell "text message" records showed excessive amounts of communications, and evidence of extra-marital relationship. Travel records showing excessive travel to conferences where extra-marital liaisons were possible." PSC stated the applicant could have disputed the statements in the punitive letter through an appeal, but did not.

PSC concluded the advisory opinion by stating that the applicant has not provided evidence that overcomes the presumption of regularity with respect to the construction or submission of the disputed OER and that there is no basis for expunging the OER or redacting the verbiage.

The Coast Guard obtained statements from the rating chain, which are discussed below.

1. The applicant's supervisor for the period under review stated that she thought the disputed OER focused too much on one incident and did not take into account his entire performance for the period.

2. The reporting officer declared that the applicant received the marks that reflected his performance for the entire period. He stated that he and the reviewer deliberated many times over the marks assigned. The reporting officer stated that the NJP aside, the applicant's achievements and performance during the period were not remarkable. The reporting officer also stated that the applicant did not become the HSWL supervisor until September 2009, and any mention of increased responsibility associated with that position deserves mention in a future evaluation, not the one ending May 31, 2009.

3. The reviewer's declaration stated that the comments that the applicant asked to be removed from the letter of reprimand explains the link to the official duties and is part of the admonishment that was given to the applicant. According to the reviewer, the evidence supporting the disputed comment in the letter of reprimand was as follows:

-Copies of Coast Guard email correspondence that included discussions developing extra-marital relationship.

-Cell phone and cell "text message" records that showed excessive amounts of communications and evidence of extra-marital relationship.

-Travel records showing excessive travel to conferences where extra-marital liaisons were possible.

The reviewer supported the mark of 2 in judgment and the related comment. In this regard, the reviewer stated the applicant's poor judgment led to the following:

-Complaints about a U.S. Coast Guard officer to NCIS by a suspicious spouse.

-Use of thousands of dollars in OE funding programmed for Work Life programs for his MWR related travel. The size of the [REDACTED] MWR program did not support a legitimate need for nationwide MWR program conferences which he was participating in.

-[The applicant's] judgment resulted in overuse of funds and time toward the small MWR program . . .

With respect to the applicant's request to raise the mark in responsibility from 3 to 4, the reviewer stated the following:

I agree with the positive actions [the applicant] listed in his BCMR request, but continue to support the marking official's mark of 3 in the responsibility element. The marking official's conclusion is justified by . . . the comment "Failed to use good judgment in development of an inappropriate relationship wrongly used disposition as MWR officer to further relationship during TDY travel . . ."

The CO stated that he supported the mark of 4 in professional presence and that "while [the applicant's] actions on many instances were consistent with higher marks, his actions related to the misconduct brought discredit to the Coast Guard and resulted in complaints to the command by an aggrieved spouse, Navy Criminal Investigative Service making inquiries about a Coast Guard officer, and the need for an internal Coast Guard investigation into his conduct.

The CO stated that while he supports the reporting officer's mark on the comparison scale in Block 9, he has no input concerning the request to change the mark from "fair performer" to "good performer."

The CO stated that he supports the reporting officer's comment not recommending the applicant for promotion. He stated that the applicant's performance and conduct during the period demonstrated a lack of judgment and responsibility needed for an O-4 position. The CO stated that while the applicant performed his primary and collateral duties enthusiastically and well, his misconduct and the Work Life program review highlighted areas where judgment and responsibility were lacking, especially for an O-4 position.

The CO stated that his decision to issue the punitive letter and his review of the OER were done carefully, with legal counsel, and in a manner to allow for continued service by the applicant, if desired. The CO stated that after his review of the BCMR package, he remains confident that his NJP decision was accurate, appropriate and fair, and that the marking official accurately evaluated the applicant's performance and potential.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

On February 16, 2010, the Board received the applicant's 10-page response to the views of the Coast Guard. He took specific issue with the reporting officer's and reviewer's statements to PSC. The applicant argued that " My rating chain, excluding [the supervisor], failed to assess my performance for the entire period but instead used the OER in question to further document a single event during the period." The applicant argued that the punitive letter was sufficient to document his actions and that to document his actions further in the disputed OER was against the recommendation of his supervisor.

With regard to the reporting officer, the applicant argued that the mark of 2 in judgment is erroneous because his performance met all of the pre-written elements on the OER form for evaluating judgment, which reads: "Ability to make sound decisions and provide valid recommendations by using facts, experience, political acumen, common sense, risk assessment, and analytical thought." He stated that he utilized all of the judgment factors in several areas including as the Personnel Support Team leader for response to Hurricane Ike. He argued that it was as a result of his leadership that each member of the team received a recommendation from him for a personal award that was approved by the reporting officer and reviewer and the team's contribution was recognized in his supervisor's Coast Guard Commendation Award citation. The applicant questioned how the members of the Team he led could be recommended for an award and the accomplishments of the team be noted in his supervisor's award citation, but he received below average marks in judgment and responsibility and an average mark in professional presence.

The applicant stated that his judgment was compromised for one isolated incident but not for the entire reporting period. He stated that he did not receive any mid-evaluation discussion from the rating chain about any deficiencies in his performance. He stated with the NJP aside, based upon the continuous feedback he received from the rating chain, he expected to receive an exemplary performance evaluation that would have resulted in his selection for lieutenant commander. With regard to the reporting officer's comment that the applicant's achievement during the period were not remarkable, the applicant listed all of the awards and accolades that he received. The applicant argued that none of his responsibilities decreased during the reporting

period, but they increased. In this regard, he stated that he assumed the duties of the HSWL supervisor, even though he did not assume the title until after the end of the reporting period.

The applicant disagreed with the reviewer's statement to PSC that the applicant used funds designated for other programs to fund his MWR related travel. In this regard, the applicant stated that his supervisor approved all of his travel and that the reviewer was aware of the travel because he approved the budget and approved all quarterly reports of expenses, profits, and inventory.

The applicant stated that the reviewer approved the mark of 4 in professional presence based upon the complaint of an aggrieved spouse, but the aggrieved spouse was not an active duty or reserve member of the Coast Guard, but a civilian employee. The applicant argued that if his performance was below the standards required for an O-4, then his supervisory duties should have decreased. Instead, they increased, such as becoming the sickbay supervisor.

PERTINENT REGULATIONS

Article 10.A.1. of the Personnel Manual defines performance dimensions as the items on which the Coast Guard evaluates its officers. It defines Evaluation areas as the four major performance categories into which all performance dimensions are grouped (e.g. Performance of Duties, Leadership Skills, etc.). Performance Standards are the prescribed expectations levels within each performance dimension. The standards are written to provide a common frame of reference among rating officials to which an officer's observed performance and qualities may be compared. Each dimension has three separate written standards of performance described as follows: 1. "Below standard" is performance not measuring up to the levels expected. 2. "Standard performance" is the high level of performance expected of all Coast Guard officers. 3. "Above standard" is superlative performance.

Article 10.A.1.d.3. of the Personnel Manual states that each officer is evaluated in the officer evaluation system, not only regarding job achievements, but also on common professional values and Service standards. These values are not only customs, but conditions of employment in the Coast Guard. They are defined by the performance dimensions and standards listed on the OER.

Article 10.A.4.c.4.g. of the Personnel Manual states that a mark of 4 represents the expected of performance.

FINDINGS AND CONCLUSIONS

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

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

2. Pursuant to the regulation at 33 CFR § 52.24(b), the Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust. The applicant has not persuaded the Board that any of the comments in the punitive letter are erroneous or inaccurate. His argument that the punitive letter suggests that he misused government funds is not persuasive. As the Coast Guard pointed out in the advisory opinion, without the investigation into the misconduct or some other evidence that the CO's comments in the punitive letter are inaccurate, the Board must presume that the punitive letter is accurate. In addition, in his statement to PSC, the CO affirmed the accuracy of the punitive letter's content and stated that it explained the link between the applicant's official duties and his misconduct. Moreover, the punitive letter does not suggest to the Board that the applicant misused government funds, but rather, that he used his position in a manner to assist him in developing the extra-marital relationship. For instance, the travel could have been properly authorized, but the applicant could have scheduled such TDY trips to meet dual purposes: to discuss legitimate Coast Guard business, and to meet up with the person with whom he was having the inappropriate relationship. The CO, who was the NJP authority and had access to the investigation, determined that the applicant's TDY schedule was used in a manner to assist him in developing the inappropriate relationship. The applicant has presented insufficient evidence to prove that the CO's assessment in this regard was erroneous.

3. The applicant argued that the comments about his use of phones and computer systems to carry on inappropriate communications with the other woman should be removed from the punitive letter because he did not violate any formal Coast Guard policy with regard to texting and because his cell phone and computer access were never taken from him. The applicant has provided no evidence as to the Coast Guard's policy on the personal use of its electronic equipment. However, the Board doubts that such a policy would support the use of Coast Guard equipment to commit adultery a violation of the UCMJ. In this case, the applicant does not deny that he used his official government equipment to communicate with the other party in the inappropriate relationship. The Board is not persuaded by the applicant's argument in this regard. Further, the Board would note that the applicant did not appeal the alleged inaccuracy of these comments or the NJP after acknowledging that he could do so.

4. With respect to the disputed OER, the Board presumes that the members of the applicant's rating chain have acted "correctly, lawfully, and in good faith" in preparing their evaluations. *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979). 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. *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).

5. The applicant has failed to prove an error or injustice with respect to the disputed marks and comments in the reporting officer's portion of the disputed OER. The applicant listed many of his accomplishments as support for his contention that he should have higher marks, but as the reporting officer and reviewer stated his accomplishments were considered when the OER was prepared. Many of the accomplishments cited by the applicant are mentioned in the OER. The fact that the applicant believes he should have had higher marks is insufficient to prove that the OER marks are erroneous or unjust. The applicant relies on the statement from the supervisor to support his contention that the disputed marks in the reporting officer's portion of the OER should have been higher. However, the reporting officer is responsible for evaluating the applicant's personal and professional qualities in Block 8, which includes the judgment, responsibility, professional presence, and health and well-being dimensions. The supervisor was responsible for evaluating the applicant in the performance of duties, communication skills, and leadership skills dimensions, and she gave the applicant mostly 6s with a few 5s, with very positive comments and no mention of the NJP. However, her marks and comments do not make the reporting officer's evaluation erroneous, particularly since each was responsible for evaluating different categories of the applicant's performance.

5. The applicant argued that the 2 in judgment should be raised to 4 because of his accomplishments during the period under review. However, Article 10.A.4.c.4.g. of the Personnel Manual states, "A mark of four represents the expected standard of performance," which is defined as "the high level of performance expected of all Coast Guard officers. *See* Article 10.A.1.c.2. of the Personnel Manual. The applicant's decision to carry-on an extra-marital affair that led to the other spouse reporting the issue to the Coast Guard Investigative Service demonstrates poor judgment and decision-making. Apparently, the applicant gave little thought to the impact his conduct would have on the Coast Guard or his career. Even the supervisor admitted that the applicant's actions brought discredit upon the Coast Guard. The mark of 2 in judgment is supported by the comment in the disputed OER that the applicant "failed to use good judgment in development of inappropriate relationship; wrongly used position as MWR officer to further relationship during TDY travel."² In the reporting officer's judgment, the applicant's decision to become involved in an inappropriate relationship during his TDY travels did not meet the high standard of performance expected of officers and was therefore not deserving of a mark of 4. Moreover, the reporting officer and reviewer reaffirmed the mark in judgment in recent statements to PSC. The applicant's disagreement with the mark does not make it inaccurate or unjust.

6. The applicant argued that the 3 in responsibility should be raised to 4 because of the favorable manner in which he carried out his duties, such as the discovery and investigation of an employee's improper use of a government credit card, and the fact that his duties were increased during the period of the disputed OER. The pre-written standard of performance expected of officers in the responsibility dimension on the OER is described as follows: "Held self and subordinates personally and professionally accountable. Spoke up when necessary, even when

² According to the pre-written standard on the OER form, an officer's performance is below standard when his or her "[d]ecisions often display poor analysis. Failed to make necessary decisions or jumped to conclusions without considering facts, alternatives, and impact. Did not effectively weigh risk, cost, and time considerations. Unconcerned with drivers of the organization."

expressing unpopular positions. Supported organizational policies and decisions, which may have been counter to own ideas. Committed to the successful achievement of organizational goals.” While the applicant held his subordinate accountable for misuse of a credit card, he clearly did not hold himself accountable for his misconduct until it was discovered and brought to his attention by the command. Nor was his misconduct supportive of organizational policies. Therefore, in the reporting officer’s judgment as evidenced by the mark of 3, the applicant’s performance in the responsibility dimension did not meet the standard expected of officers and therefore was not deserving of a mark of 4 or higher. As stated earlier, the applicant’s performance of his duties was generally favorable, but as the reviewer noted, the reporting officer supported the 3 in responsibility by the comment “wrongly used position as MWR officer to further relationship during TDY travel.” The reporting officer and reviewer recently reaffirmed the mark of 3 in the responsibility dimension. The applicant’s disagreement with the mark does not prove that it is erroneous or unjust.

7. In alleging that the mark 4 in the professional presence dimension should be raised to a 5, the applicant pointed to his participation in several activities that placed the unit and Coast Guard in a favorable light, such as representative for the Combined Federal Campaign, representative on the Federal Executive Committee’s Workforce Diversity Council, volunteering for community service, and receiving a community service award. The reporting officer mentioned the applicant’s accomplishments in his Block 8 comments of the disputed OER. However, the reporting officer also noted that the applicant’s inappropriate relationship was not in alignment with the Coast Guard’s Core Values. An element of the standard level of performance expected of officers in the professional presence dimension of an OER is that the officer “abided by the core values of honor, respect, and devotion to duty.” Although the applicant failed in this regard, the reporting officer noted that for most of the period he was a strong advocate for community involvement and gave the applicant a 4 in professional presence. The applicant has failed to prove that the mark is erroneous or unjust. His argument or opinion that he is entitled to a higher mark does not cause the mark assigned to be erroneous or unjust.

8. The applicant also disagreed with his mark as a “fair performer” on the comparison scale in Block 9. Here, the reporting officer compares the applicant with others of the same grade that he has known throughout his career. In the reporting officer’s judgment, the applicant was a “fair performer” who was recommended for increased responsibility. The Board cannot substitute its judgment for that of the reporting officer in the absence of persuasive evidence that the reporting officer based his comparison scale mark on something other than his honest evaluation of the applicant’s performance at the time.

9. The applicant argued that the “not recommended for promotion” should be removed from Block 10 because it contradicts with his assignment as the HSWL supervisor, which constituted an increase in his responsibilities. However, the reporting officer disagreed that the applicant was assigned as the HSWL supervisor during the period under review. The reporting officer’s comment in this regard is supported by the absence of any mention of the applicant being the HSWL supervisor in the description of duties block of the disputed OER. The applicant’s rebuttal, that even though he assumed the HSWL title after the reporting period ended he assumed the duties during the reporting period, does not persuade the Board to remove the not recommended comment. In this regard, the reporting officer noted in block 10 that the applicant

needed to demonstrate the ability to make better decisions without oversight to gain his recommendation for promotion. The reporting officer was the individual responsible for making the promotion assessment based upon his observation of the applicant's performance and any other information he obtained during the period under review. The Board will not substitute its judgment for that of the responsible officer in the absence of persuasive evidence that the recommendation is based on something other than the reporting officer's honest assessment of the applicant's potential to serve in the higher grade at that time. The applicant has not submitted such evidence.

10. An officer who has been punished at NJP for violating Article 133 of the UCMJ has not met the expected high level of performance expected of officers. Therefore, the NJP was a sufficient basis for assigning a 2 in judgment, 3 in responsibility, 4 in professional presence, fair performer in Block 9, and a "not recommended for promotion in Block 10, as the applicant's violation of the UCMJ reflected his performance in those areas. Moreover, the Board is not persuaded by the applicant's argument that the reporting officer and reviewer based the evaluation of his performance on the NJP and ignored his overall performance. That argument is not supported by the OER in which the supervisor gave the applicant 5s and 6s and the reporting officer assigned marks ranging from 2 to 6 in the personal and professional qualities section of the OER and mentioned the applicant's accomplishments while also holding him accountable for his misconduct.

11. The applicant argued that the punitive letter was sufficient to document his misconduct and that it was against the recommendation of his supervisor to document it in the disputed OER. However, the supervisor did not say that the applicant's misconduct should not be mentioned in the OER, but that she thought the OER focused too much on that one incident. The supervisor stated her opinion, but it was not the opinion of the reporting officer who was responsible for evaluating the applicant's performance in blocks 8, 9, and 10. Moreover, the Personnel Manual emphasizes the importance of documenting an NJP in an officer's OER because it requires the submission of a special OER if an officer receives NJP and the process is not completed during the current reporting period. See 10.A.3.c.b. of the Personnel Manual. The applicant's NJP was completed during the reporting period and it was proper for the rating chain to consider it in evaluating the applicant's performance.

12. The applicant has failed to prove by a preponderance of the evidence that the disputed OER or punitive letter contains a misstatement of significant hard fact, factors that had no business being in the rating process, or a prejudicial violation of a statute or regulation. Accordingly, the applicant has failed to prove error or injustice in this case and it should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

Donna M. Bivona

Nancy L. Friedman

Dorothy J. Ulmer