

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2010-038

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of a completed application on November 19, 2009, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated August 12, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by removing two officer evaluation reports (OERs) for the period July 1, 2002 to January 31, 2003 (first disputed OER) and from February 1, 2003 to June 30, 2004 (second disputed OER) and by replacing them with reports prepared for continuity purposes only. The applicant asked to be promoted to the rank of lieutenant commander (LCDR). In this regard, the applicant failed to be selected for LCDR before the promotion year [REDACTED] selection boards. He also requested to be reimbursed for tuition costs for which he claimed he was ineligible due to his mandatory retirement, resulting from having twice failed of selection for promotion to the next higher grade. The applicant was involuntarily retired on [REDACTED]

APPLICANT'S ALLEGATIONS

The applicant received the first disputed OER while assigned as Chief, Planning and Coordination Branch for a Marine Safety Office (MSO) and he received the second disputed OER while assigned to duty as the 1ST Tour Marine Instructor at the same command. The supervisor and reporting officer were different for each OER but the reviewer was the same.

The applicant argued that under Article 10.A.2.g.b of the Personnel Manual the reporting officers were disqualified from his rating chain because they could not objectively and fairly evaluate him.¹

First Disputed OER

The applicant alleged that the reporting officer for the first disputed OER was biased, prejudiced, and hostile towards him, which led the reporting officer to write unfair and damaging comments in the OER. The applicant contended that the reporting officer's (LCDR R's) animosity toward him was triggered when he told LCDR R that his order for members to keep a daily log was a burden since it took a good part of the day to constantly update the log. According to the applicant, from that time on, LCDR R constantly mistreated him and questioned everything he did, even in front of enlisted members. The applicant stated that LCDR R never gave him any positive feedback and frequently forced him to stay after hours "just in case [LCDR R] needs you." The applicant also complained that when his nephew was murdered, no one from the command called to offer condolences; nor did anyone from the command call to check up on him and his family after [REDACTED]

The applicant offered several examples of interactions between him and LCDR R that he considered to be humiliating. In one example, the applicant stated that LCDR R knew the applicant was scheduled to participate in a specific meeting, but when the applicant returned from that meeting, LCDR R asked him how long did the meeting take and why he was not in a specific training course that LCDR R had organized and attended. The applicant stated that in another incident, LCDR R told him in Spanish that he was very sad that the applicant had submitted a paper to transfer to the Inspections Department and that they would talk later. The applicant stated that he felt threatened by LCDR R's remarks and that LCDR R retaliated against him for requesting a transfer by treating him more poorly.

The applicant stated from about October 2002 to March 2003, he suffered from heart palpitations and anxiety and panic attacks, for which he was occasionally placed in a "sick in quarters" status. He stated that on one particular day when he was driving the CO and LCDR R to a meeting, he began to suffer heart palpitations. He stated that when he told the CO and LCDR R that he needed to stop by the clinic, LCDR R laughed and said in a sarcastic manner: "[The applicant's name] before you die, even if it is on your last breath I need you to call." The applicant stated that he felt humiliated and very upset.

The applicant stated that when he moved to the Vessel Inspection Department, he was still required to work as a command duty officer, which was contrary to the manner in which every other officer was treated who went to the Vessel Inspection Department before him. According to the applicant, the CDO duty plus his vessel inspection duty made the qualification process much harder.

¹ This provision states that disqualified includes "relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the . . . reporting officer . . . raises a substantial question as to whether the reported officer will receive a fair, accurate evaluation."

The applicant offered statements from several individuals to support his overall contention that the reporting officer was prejudiced against him and therefore, unable to evaluate him in an objective and fair manner. The statements are summarized below:

1. [REDACTED] was stationed at the applicant's unit from 2002 to 2004 and was under the leadership of LCDR R in the Port Operations Department. [REDACTED] claimed that LCDR R's leadership style was poor and that it induced unnecessary work stress within the Port Operations Department. The BMC stated that LCDR R would criticize personnel that he did not like. In this regard, [REDACTED] wrote the following:

In my presence [LCDR R] complained about [the applicant] and a few other petty officers independently of who was present. He complained about [the applicant's] health issues in front of me and other junior petty officers displaying complete disregard of work ethics . . . The animosity displayed by LCDR [R] toward [the applicant] was such that a fellow CPO [chief petty officer] and [a] petty officer asked me if I knew the reason for the personal mistreatment received by [the applicant] from LCDR [R]. I personally noticed how LCDR [R's] expression changed from a friendly to a serious facial expression when [the applicant] approached.

The last time LCDR [R] made a comment in regard to [the applicant] he called him "good for nothing officer" (in Spanish) to two other Spanish speaking petty officers who I was talking to and LCDR [R] got involved in the conversation. [The applicant] had just gotten back from a morning brief at the Sector . . . Ops Center at that moment and I got so upset and tired of his attitude that I told him to stop making negative comments about the LT, or anyone else he didn't like, especially in front of others. After that he never made any comments in regard [to the applicant].

2. [REDACTED] wrote that he was assigned to the MSO from December 1999 to July 2006 and worked for LCDR R from July 2002 to September 2004. He stated that he was a witness to many derogatory statements about Puerto Ricans by individuals inside and outside the unit. Although LCDR R did not initiate any of these comments, he did not intervene or take any corrective action against individuals who made such comments.

3. [REDACTED] wrote that she was stationed with the applicant from 2002 to 2003 and that LCDR R was their supervisor. She stated that the applicant mentioned to her that he felt singled out by LCDR R and that he was treated unfairly. She stated that the applicant told her of a shouting match that he had with LCDR R and that the applicant's request for a transfer to another department had been turned down. She stated there was a sense of negativism and pessimism among the junior officers.

4. [REDACTED] wrote that he reported to the MSO on July 1, 2003 and that LCDR R was his reporting officer. He stated that during his first few months in the department, he noticed significant strife between LCDR R and the applicant. He stated that he was not aware of the details between the two but the applicant would occasionally return to his desk (next to LCDR

█s) very discouraged and depressed because of his interactions with LCDR R. He stated that LCDR R mentioned that the applicant had some medical issues, but did not provide any details. █ wrote that while the applicant worked next to him, he was definitely anxious when LCDR R was present in the office.

5. █ wrote that he worked in the Port Operations Department from June 2003 to June 2004. He stated that the department appeared to be in a state of transition, and with all of the change there were some tensions within the department. He stated on one occasion, he witnessed the division chief (LCDR R) approach the applicant and within a matter of minutes their conversation went from a normal level of discussion to a shouting match. He stated that he did not know the specifics that led to the outburst, but apparently those issues were never resolved because the relationship remained strained and broken.

6. █ wrote that he was stationed at the same unit as the applicant from July 2002 to May 2005. He stated that he recalled the Chief of Port Operations, █ (reporting officer for second disputed OER) making derogatory comments and making fun of the applicant's medical condition, such as saying the applicant was soft and incompetent.

7. █ wrote that he served with the applicant's unit from March 2003 to March 2006 and worked directly for █. He stated that on several occasions █ made degrading public remarks in the bull pen about the applicant's medical condition that left the applicant demoralized.

8. █ wrote that he was stationed at the applicant's unit from January 2004 to June 2006. He questioned the legitimacy of LCDR R's container inspector qualification.

On the first disputed OER, the applicant received marks of mostly 5s in the performance dimensions. He received marks of 4 in the evaluations and initiative categories, as well as a mark in the fourth block (one of the many professionals who form the majority of this group) on the comparison scale in block 9. As stated earlier, the applicant seems most concerned with the mark of 4 in initiative and the mark in the middle block on the comparison scale in the reporting officer's portion of the OER, as well as the following reporting officer's comments in blocks 7 & 8.

The reporting officer wrote the following in block 7 of the first disputed OER:

ROO [reported-on officer] continues growth as M[arine] Professional. Had adapted to new RO [reporting officer] style; ROO given greater autonomy on long-term comprehensive projects & has steadily shown increasing perseverance. I'm confident that, with appropriate tasking, ROO has mix of experience and dedication to realize missions and provide future CG dividends. ROO consistently gave superiors good counsel. His efforts were instrumental in carrying out many COTP missions successfully during this very high op-tempo period.

The applicant specifically complained about the following comments quoted in the above paragraph:

Comment: “Had adapted to new RO [reporting officer] style; ROO given greater autonomy on long-term comprehensive projects & has steadily shown increasing perseverance.” The applicant stated that the comment is unfair and damaging because it portrays him as an officer in constant need of direction. He argued that his previous OERs that evaluated him in the same job show that he was doing excellent work. He also argued that the comment conflicted with statements in block 8 that he “undertook various taskings including; made contacts w/local agencies for input to WMD . . . plan & update of Marine Firefighting plan; plan and update/completed increasing response capability . . .”

Comment: “I’m confident that, with appropriate tasking, ROO has mix of experience and dedication to realize missions and provide future CG dividends.” The applicant contended that this comment is inaccurate, unfair and unjust because it gives the impression that he was not productive during the marking period. The applicant stated that the comment is contradicted by the last sentence in that paragraph which stated: “His efforts were instrumental in carrying out many COTP missions successfully during this very high op-tempo period.” The applicant also argued that the challenged comment is rebutted by this comment in block 10 (potential) of the OER: “Extremely capable officer & marine safety professional. [Member] is a valuable asset & has performed well during this period particularly during issues where a calm demeanor & well rounded experience is required.”

The applicant alleged that the mark of 4 in the initiative dimension of the Personal and Professional Qualities area of the first disputed OER is inconsistent with the supporting comments. He restated his argument that LCDR R was not qualified to evaluate him fairly and objectively because of his animosity and prejudice toward the applicant. The reporting officer wrote comments such as the following in the section 8 comments block:

Undertook various taskings including made contact w/local agencies for input to WMD plan & update of Marine Firefighting plan; . . . Wrote SOP for MSO OpCen liaison during MARSEC II op. SOP established policy and proved worth thru use by other watchstanders. Took prompt action to last minute notification of arrival of vsl w/significant safety issues . . . Quickly addressed response needs during commercial vsl grounding; actions resulted in successful refloating with no impact to environment . . .

With respect to his placement in the fourth block on the comparison scale in block 9, the applicant argued that the mark was inconsistent with everything else the reporting officer wrote in his portion of the OER. He noted that in his two previous OERs, which evaluated his performance in the same job, he was placed in the fifth highest block on the comparison scale.

In describing the applicant’s potential in block 10 of the OER, the reporting officer wrote the following:

Extremely capable officer & marine safety professional. Mbr is a valuable asset & has performed well during this period particularly during issue where a calm demeanor & well rounded exp is req'd. His people oriented leadership style has earned respect from subordinates and proven to be effective in all situations. Bilingual skills & ability to focus on priorities have been valuable to mission accomplishment. Desires to be assigned to MSO inspector billet to con't professional development. This will allow him to broaden his experience, achieve professional goals & successfully compete for future challenging assignments. Recommended for con't promotion w/peers.

The Second Disputed OER

The second disputed OER for the period February 1, 2003 to June 30, 2004 evaluated the applicant's performance as an 1ST Tour Marine Inspector, with a different supervisor and reporting officer than in the first disputed OER.

In the supervisor's portion of the OER, the applicant received marks of 4 in using resources and professional competence and marks of 5 in planning and preparedness, results/effectiveness, and adaptability in the performance of duties area of the OER.

In the communications area of the OER, the supervisor gave the applicant marks of 4 in speaking and listening and writing dimensions.

In the leadership skills areas of the OER, the supervisor assigned the applicant marks 4 in looking out for others, teamwork, workplace climate, and evaluations and marks of 5 in the developing others and directing others dimensions.

In the reporting officer's portion of the OER, the applicant received marks of 4 in the initiative, judgment, responsibility, professional presence, and health and well-being dimensions. He received a mark in the third lowest block on the comparison scale (fair performer; recommended for increased responsibility).

The applicant alleged that the reporting officer, [REDACTED] directed the supervisor to lower or assign certain marks in the supervisor's portion of the OER, which violated Article 10.A.2.f.2 of the Personnel Manual. This provision prohibits the reporting officer from directing the supervisor to change marks and/or comments.²

² The Coast Guard in its advisory opinion agreed with the applicant that the reporting officer violated the Personnel Manual by directing the supervisor to assign certain marks to the applicant in the supervisor's portion of the OER and recommended that the OER be removed. The applicant challenged the marks and comments in this OER, but in light of the Coast Guard's admission of error, the Board need not consider the remaining allegations.

Failures of selection for promotion to LCDR

The applicant alleged that his two failures of selection for promotion to LCDR were due to the alleged erroneous OERs. He argued that make whole relief with regard to his failures is a direct promotion to LCDR by the Board.

The applicant further contended that he has not been able to utilize tuition assistance to pursue a graduate degree because of his mandatory [REDACTED] [REDACTED] retirement date caused by his two failures of selection for promotion to the next higher grade.

Applicant's other OERs

On his first LTJG OER, the applicant received eight 5s, nine 6s, one 7 and a mark in the fifth place on the comparison scale. On his second LTJG OER, the applicant received one 4, twelve 5s, five 6s, and a mark in the fifth place (out of seven places with the seventh being the highest) on the comparisons scale. On his third LTJG OER, the applicant received one 4, twelve 5s, five 6s, and a mark in the fifth block on the comparison scale. On his fourth LTJG (the first disputed OER) the applicant received two 4s, thirteen 5s, three 6s, and a mark in the fourth (middle) block on the comparison scale. The first disputed OER is the last the applicant received as a LTJG.

The applicant's record has five OERs in the grade of LT. On his first OER (second disputed OER), the applicant received thirteen 4s, five 5s, and a mark in the third of seven blocks on the comparison scale. On his second LT OER, the applicant received ten 4s, seven 5s, one 6, and a mark in the fourth block on the comparison scale. On his third LT OER, the applicant received two 4s, ten 5s, three 6s, and a mark in the fifth block on the comparison scale. On his fourth LT OER, the applicant received seven 5s, eleven 6s, and a mark in the fifth block on the comparison scale. On his fifth LT OER, the applicant received nine 5s, eight 6s, one 7, and a mark in the fifth block on the comparison scale.

VIEWS OF THE COAST GUARD

On April 8, 2010, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant the following partial relief, as recommended by PSC:

Correct the 2003/01/31 OER date of submission [on the first disputed OER] by replacing the date in block 1.m. with 2003/01/10.

Replace the [second disputed OER] with a Continuity OER.

Submit the applicant's record for a second consideration for selection at the [PY]

[REDACTED]

If a decision is not rendered by the BCMR prior to the applicant's scheduled separation date [REDACTED], the applicant should be separated as previously ordered and await the final results of the Board.

The JAG asked that PSC comments serve as the advisory opinion. In recommending partial relief, PSC stated that based upon declarations from the rating chain for the second disputed OER and the statements from the applicant, the reporting officer violated the regulation by amending the supervisor's marks and comments. PSC stated that the supervisor, in a recent statement, confirmed that changes were made to the second disputed OER, even though they were not adverse. According to PSC, the supervisor accepted the changes out of respect for the reporting officer's seniority and experience. PSC also stated the following:

The supervisor stated that he forwarded input to the applicant's reporting officer and he was informed that LCDR R would be a part of the review since he had observed the applicant while he was assigned to the Port Operations Division. In this case the supervisors should have worked closely to evaluate the applicant's performance since it spanned two different divisions.

The reviewer/commanding officer failed to ensure the [second disputed] OER was accurate, fair and objective by not maintaining rating chain continuity . . . Based on the aforementioned inaccuracies this OER is not a valid report. All other inaccuracies brought forth by the applicant concerning this OER were not considered.

Advisory Opinion on the First Disputed OER

PSC recommended that the submission date the OER be changed from January 31, 2003 to January 10, 2003. PSC did not recommend any relief with respect to the marks and comments on the first disputed OER. PSC stated that the marks and comments portray the applicant as an above average performer, despite the applicants view to the contrary. PSC stated that the applicant offered conjecture but not concrete evidence that shows that his performance was different than that described by the reporting officer. PSC noted that none of the applicant's marks were lower than 4, which represents the expected standard of performance for a Coast Guard officer.

PSC stated that the 4 in the initiative dimension is consistent with the comment "Undertook various taskings including: made contacts w/local agencies for input to WMD plan & update of Marine Firefighting plan; plans updated/completed increasing capability." PSC stated that the comments placed the applicant in a positive light and are not indicative of a rating chain member acting with malice.

PSC noted the applicant's allegation that the comparison scale mark in the middle block is inconsistent with the reporting officer's marks and comments in blocks 7 & 8. PSC stated that the comparison scale does not necessarily denote a trend in performance, thus an officer could improve in performance but drop a category from period to period. PSC stated that the comparison scale is a relative ranking of an officer compared to officers of the same grade that

the reporting officer has known throughout his career and does not require supporting comments in blocks 7 and 8.

PSC stated that contrary to his contention, the applicant did not provide information to support disqualifying the rating chain; nor did he demonstrate how the alleged conduct was manifested in the disputed OER.

Advisory on the Removal of the Applicant's Failures of Selection for Promotion to LCDR

PSC stated that the Coast Guard has no record to confirm or dispute the applicant's contention that his record was eliminated "on the first round of both promotion boards due to the disputed [OERs]." Furthermore, PSC noted that it is impossible to predict what impact, if any, the applicant's disputed OERs may have had on the proceedings of the [REDACTED] [REDACTED] [REDACTED] selections boards. PSC further stated:

The [second disputed] OER was the applicant's [REDACTED]. The promotion board reviewed four OERs that occurred prior to the second disputed OER and six OERs subsequent to the second disputed OER. PSC believes it is highly unlikely that one OER would have resulted in the member's non-selection; however it is in the best interest of the applicant to give him one final opportunity to go before a selection board with a Continuity OER instead of the second disputed OER.

Rating Chain Statements Attached to the Advisory Opinion

1. The supervisor for the first disputed OER [REDACTED] stated that the disputed OERS are a fair and accurate depiction of the applicant's performance and do not contain any damaging comments. He stated that as a LTJG, the applicant performed well with proper guidance and capitalized on his experience as a previously enlisted member. However, more would have been expected of him as a LT. [REDACTED] further stated the following:

[The applicant] states . . . that he was micromanaged by LCDR R. My interpretation of this is that he was given clear direction, sometimes to the level of detail LCDR R thought necessary. I too was a subordinate of LCDR R and don't believe he was a micromanager. He adjusted his leadership style as he thought necessary to ensure mission accomplishment. I also received detailed instructions when necessary but never viewed it as being micromanaged. It is important to note that not only did we have a new Port Operations Department Chief (LCDR R), we also had a new commanding officer, who in my opinion, held those at his command strictly to the standards written on the OER form . . . I too had to adjust to meet the expectations of this new rating chain.

[The applicant] stated that he was constantly abused and humiliated by LCDR R. In my opinion, this is not true. As his assistant, I believe I was very much aware of happenings within the department and would have been aware of any abuse or

humiliation. From my perspective, LCDR R treated all subordinates with the same utmost professionalism.

* * *

[The applicant] states . . . that LCDR R and ██████ conspired to give him a damaging OER due to their irrational prejudice towards him. I have known both of these officers for many years and have worked with and for both of them during my career. I have no reason to believe that they would conspire to end the career of a LT. I am confident that they evaluated [the applicant] against the same standard they used for any other subordinate.

2. The reporting officer for the first disputed OER, LCDR R, stood by his evaluation of the applicant's performance and elaborated extensively on the allegations and documentary evidence submitted by the applicant. LCDR R wrote the following in pertinent part:

[M]y comments accurately captured my best assessment of [the applicant] at the time and I still stand by them. I believe they stand on their own and are actually complemented by [the applicant's] own comments in his BCMR. I did not intend them to be a kiss of death for subsequent promotions and therefore was generous in my compliments to the utmost whenever, I could; unfortunately my compliments are being used as contradictions. Had I really been as hell-bent on prejudicing future boards as [the applicant] feels I was, the tone of my write up would have been drastically different. I felt the applicant deserved a chance; I did believe his forte may be elsewhere. As a LTJG, I felt being part of a bullpen or cadre of officers with similar responsibilities would provide him an opportunity to regroup. For whatever reason, I still felt [the applicant] could accomplish much more than he thought capable of; his OERs while at ██████ bear me out.

3. The supervisor for the second disputed OER, LCDR P, made positive statements about the applicant's performance. He stated that because the applicant spent part of the reporting period in the Port Operations Department, LCDR R was consulted about the applicant's performance. LCDR P stated that when he was counseled he noticed that the OER he submitted was different from the OER he signed. He stated that the comments and marks that he proposed had changed and that he did not remember exactly which marks were affected. He stated that because he was a junior LT at the time and the reporting officer, ██████ was a middle grade officer, he took the OER as a learning experience and trusted the judgment of the reporting officer.

APPLICANT'S REPLY TO THE VIEWS OF THE COAST GUARD

The applicant agreed with the Coast Guard that the second disputed OER should be removed and replaced with a report for continuity purposes. He requested that the block 2 description of duties³ be modified from:

³ In a Continuity OER, the description of duties block is completed, but the remainder of the OER is marked non-observed.

1ST TOUR MARINE INSPECTOR (08/04-06/04):⁴ Quality in MI development program & qualify Foreign Freight Vsl INSP. PLANNING & COORDINATION BRANCH (02/03-08/03): Supervises 1 CPO & 1 senior PO with overall responsibility for unit's contingency planning activities & information sharing via unit website including oil/hazmat, hurricane & marine fire fighting. Coordinates w/other Fed/State & local gov't agencies & industry to ensure plan development. Manages scenario development & exercises to test/refine & create new plan. COLL DUTY: Command Duty Ofcr (CDO); Directs COTP actions during port safety, environment emergencies in AOR.

To:

PRIMARY: PLANNING & COORDINATION BRANCH, Supervised one CPO and one PO1 with overall responsibility for all unit contingency-planning activities & info sharing via unit website including oil/hazmat, hurricane, and marine fire fighting. Coordinates w/other Fed/State & local Government Agencies & industry to ensure most comprehensive plan development. Manages scenario development & exercises to rest/refine & create new plans. Collateral Duties: Command Duty Officer (CDO) – Manages all after-hrs MSO related incidents in 21 port AOR of PR and USVI & maintains critical link between GANTSEC/D7, Conducts Inspections of FV, CS and SPV.

With respect to the first disputed OER, the applicant agreed that the submission date should be changed to January 10, 2003. However, the applicant disagreed with the Coast Guard's conclusion that the first disputed OER accurately documented his performance during the rating period. He further disagreed that he had not carried his burden of proving that the reporting officer's behavior towards him was unprofessional, biased, and hostile and was manifested in LCDR R's allegedly inaccurate evaluation of his performance in the first disputed OER. The applicant made the same arguments that he made in his initial submission to the BCMR (and they will not be repeated here).

The applicant stated that except for the 4 in initiative, the mark in the middle block on the block 9. comparison scale, and the challenged comments in block 7 of the first disputed OER, the remainder of the OER is acceptable. Therefore, he requested rather than deleting the entire OER, that the Board raise the 4 to 5 in the initiative block, raise the mark on the comparison scale from the middle block to the fifth place (out of 7) and delete the following underlined comments from block 7:

ROO [reported-on officer] continues growth as M Professional. Had adapted to new RO [reporting officer] style; ROO given greater autonomy on long-term comprehensive projects & has steadily shown increasing perseverance. I'm confident that, with appropriate tasking, ROO has mix of experience and

⁴ The 08/04 began date is obviously incorrect in light of the fact that the reporting period ended on 6/30/2004. The Coast Guard should correct this discrepancy on the continuity OER.

dedication to realize missions and provide future CG dividends. ROO consistently gave superiors good counsel. His efforts were instrumental in carrying out many COTP missions successfully during this very high op-tempo period.

The applicant asked that if the Board deletes the underlined comments that it also direct the Coast Guard to include a note that the comments were removed by order of the BCMR.

With regard to the Coast Guard's recommendation that his record be given a second consideration before the [REDACTED] selection board, the applicant stated that he stands by his request for the Board to promote him to LCDR. He argued that a direct promotion is the only manner in which he can be made whole. He stated that his record would still be prejudiced before the [REDACTED] selection board because it will be evident to selection board members that he already twice failed to be selected for promotion to LCDR. He also argued that his opportunity for promotion before the [REDACTED] Board will be [REDACTED] lower that it was before the [REDACTED] and [REDACTED] boards according to [REDACTED], because of retention and budgetary restraints.⁵

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. Under *Detweiler v Pena*, 38 F.3d 591 (D.C. Cir. 1994), the application was timely.

2. The Board begins its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.⁶

First Disputed OER

3. The applicant alleged that the first disputed OER is inaccurate because the reporting officer was biased and prejudiced against him and was unable to objectively evaluate his performance, which disqualified him as a member of the applicant's rating chain under Article 10.A.2.g.2.b. of the Personnel Manual. This provision states that disqualified includes "relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the . . . reporting officer . . . raises a substantial question as to whether the reported officer will receive a fair, accurate evaluation."

⁵ The applicant also stated that in order to avoid a new BCMR application, he was requesting that the Board direct the Coast Guard to change the date on his Marine Safety Professional Insignia to July 2004 and to enter the Foreign Freight Vessel qualification into his record. He claims these issues are related to his BCMR application.

⁶ 33 C.F.R. § 52.24(b).

4. The applicant has failed to prove that LCDR R, the reporting officer for the first disputed OER was biased and prejudiced against him. Many of the complaints against LCDR R are about decisions that LCDR R made as head of the division in which the applicant worked. The Board finds that LCDR R did not exceed his authority or treat the applicant unfairly by requiring the members of the department (including the applicant) to keep a log of their daily activities, by requiring members to stay beyond normal work hours if he thought they would be needed to complete a task, by denying the applicant's request for a transfer to another division at a particular time if such was not in the best interest of the Coast Guard, or by questioning the applicant about his whereabouts when he missed a training session. All such actions were within LCDR R's authority as head of the division in which the applicant worked. Since the applicant was the subordinate, it was his responsibility to adjust to the reporting officer's management style and not the other way around. The applicant's hesitancy in adjusting to the reporting officer's management style was a proper issue for consideration when evaluating his performance and preparing his OER. The applicant has offered no evidence that he was treated differently than other officers on these specific issues. Although he stated that no other officer was required to serve as CDO when they transferred from the Port Operations Division, he submitted no proof of this alleged difference in treatment. Moreover, even if others had been treated differently, the mission could have changed necessitating how assignments were made or duties assigned.

5. The applicant's complaints that LCDR R never gave him positive feedback, failed to offer condolences upon the death of his [REDACTED], failed to show any concern when he and his [REDACTED] [REDACTED] and was unaware of the applicant's promotion were essentially admitted by the reporting officer. While it was reasonable for the applicant to feel disappointed in his supervisor for these perceived slights, there is no evidence that LCDR R's inactions in this regard were due to any bias or prejudice against the applicant. Again, the applicant has offered no evidence that he was treated differently than others in similar situations.

6. With regard to the allegation that LCDR R laughed and made a sarcastic comment about the applicant in front of the CO when the applicant became sick and needed to stop by the hospital, LCDR R denied that he laughed or made the sarcastic comment. There are conflicting statements from members of the unit on this allegation. According to [REDACTED], LCDR R complained about the applicant's health problems in front of officers and enlisted members. However, [REDACTED] [REDACTED] stated that it was [REDACTED] who laughed and made fun of the applicant's medical condition. Therefore, the Board finds that the applicant has failed to prove by a preponderance of the evidence that LCDR R laughed at or made fun of the applicant's medical condition.

7. LCDR R admits that he shouted at the applicant after telling the applicant he should look for a particular key and the applicant replied to him that he should look for the key because he already gave it to him. While raising his voice to the applicant in this particular instance may not have been the best practice, there is no evidence that it was done because LCDR R was biased against the applicant. In addition, the applicant also acted inappropriately by shouting back at his reporting officer who was also his superior commissioned officer. The statements from the applicant, LCDR R, and several other officers stationed at the unit suggest that there

was some strife between the applicant and the reporting officer. However workplace tension between supervisor and employee does not necessarily mean that a supervisor is biased against a subordinate or that the supervisor can not fairly and objectively evaluate an officer's performance. In BCMR No. 2000-037, the then-Secretary's delegate found that disagreement between the rating chain and the reported-on officer about management style did not equate to a personality conflict and that . . . comment on that reported-on officer's management or mismanagement of a particular project was "entirely appropriate for an OER."

8. Since the applicant has not proven that LCDR R was disqualified to serve on his rating chain due to bias or prejudice, the issue becomes whether there were mistakes of significant hard facts in the disputed OER that would entitle the applicant 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). The burden of proving misstatements of significant facts is normally met by credible statements from individuals offering a different view of the applicant's performance based upon their personal knowledge and observations or some other evidence that establishes an inaccuracy in the OER. The supervisor and reporting officer have reaffirmed the accuracy of the OER and the applicant has only offered his assessment of his performance to prove otherwise. The applicant's disagreement with the evaluation is insufficient to prove that the OER is inaccurate.

9. Even if the applicant had proven LCDR R was biased against him (which he has not), he would still need to show that the bias manifested itself through misstatements or inaccuracies in the OER. As stated above, the applicant has offered no evidence, other than his own analysis, that the disputed comments and marks in the first disputed OER are inaccurate. Nor has he provided any evidence that his performance was better than indicated in the first disputed OER.

10. With regard to the 4 in initiative, the applicant argued that it is inconsistent with the reporting officer's comments. The Board, having read the entirety of the reporting officer's comments did not find them to be inconsistent with a 4. Article 10.A.4.c.4.g. of the Personnel Manual states, "A mark of 4 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 offers no evidence of his performance, except for his own statement, during the reporting period that is not mentioned in the disputed OER that would mandate a mark higher than 4 in the initiative dimension.

11. The applicant believes that his mark in the middle block on the comparison scale in block 9 of the disputed OER is inaccurate because it is inconsistent with the reporting officer's comments. Again based upon the Board's review of the reporting officer's comments, we do not find the mark in middle block on the comparison scale, which describes the applicant as one of the many competent professionals who perform the majority of this grade, to be inaccurate or inconsistent with the reporting officer's comments. Moreover, this mark represents the reporting officer's comparison of the applicant with other LTs that the reporting officer has known throughout his career and is not necessarily a trend of performance. Article 10.A.4.c.8.a. of the

Personnel Manual. The fact that the applicant received marks of 5 on the comparison scale from previous reporting officers is not proof that the current reporting officer's mark is not his honest assessment of where the applicant placed when compared to other LTJGs. In light of the above the Board finds that the applicant has failed to prove an error or injustice with respect to the evaluation of his performance in the first disputed OER.

12. As recommended by the Coast Guard and in the absence of any objection from the applicant, the Board will correct the report submission date in block 1.m. from January 31, 2003 to January 10, 2003.

Second Disputed OER

13. The Coast Guard found, and the Board agrees, that the second disputed OER, which involves a different reporting officer, should be removed, because the reporting officer violated Article 10.A.2.e.2.c. of the Personnel Manual by directing the supervisor to assign or change certain marks and comments in the supervisor's portion of the disputed OER. In light of this finding, there is no need to address other allegations raised by the applicant with regard to the second disputed OER. The Board will direct that the second disputed OER be removed and replaced with a report for continuity purposes.

The Board notes that the applicant has asked that his rewrite of the description of duties be substituted for those in block 2. However, according to Article 10.A.3.a.5.d. of the Personnel Manual, preparing the description of duties section of the Continuity OER is the responsibility of the supervisor and the Board will not order it to be rewritten without the supervisor's review. The Coast Guard is encouraged to review and use the applicant's draft revised description of duties for the continuity OER if the supervisor has no objection to it.

Removal of Failures of Selection for Promotion to LCDR

14. The applicant requested that upon a finding of error or injustice that the Board order his promotion to the grade of LCDR, as well as direct the removal of his two failures of selection of promotion to LCDR. The Board does not normally promote but instead removes failures of selection for promotion that allows the applicant another opportunity(s) to be considered for promotion by a duly constituted selection board with a corrected record. *See United States v. Dodson*, 988 F.2d 1199 (Fed. Cir. 1993), *citing Doyle v. United States*, 599 F.2d 984, 998 (1979) (stating that the BCMR may potentially remedy an error which it has found to have occurred in a selection decision by ordering a new selection board convened to make the decision de novo). Moreover, decisions on promotions are better left to the Service which has a selection board process in place to determine who is best qualified for service in the next higher grade.

15. Acknowledging the error with regard to the second disputed OER, PSC recommended that the applicant be given a final opportunity for selection for promotion to LCDR, which is essentially a recommendation for the removal of his second failure of selection before the [REDACTED] [REDACTED] selection board. The Board agrees with the removal of the second failure of selection for promotion, but also finds that the first failure should be removed. If the

disputed OER was prejudicial to the applicant before the second selection board, it is reasonable to conclude that it was also prejudicial before the first selection board.

16.. The Board finds that the erroneous second disputed OER with a mark in the third place (out of a high of 7) on the comparison scale that described the applicant as a fair performer when all of his other OERs described him as either a good or excellent performer was prejudicial. By recommending that the applicant receive a final look before the LCDR selection board, the Coast Guard admits that the erroneous OER was prejudicial. In BCMR No. 2008-115, the Coast Guard recommended removing that applicant's two failures of selection for promotion because of the erroneous prejudicial comments the Board ordered removed were in his record both times that it was considered by the selection board. Accordingly, the applicant's two failures of selection should be removed from his record and he should be allowed two additional opportunities to compete for promotion to LCDR based upon a corrected record.

17. Article 12.A.13.d.1. of the Personnel Manual states that an officer in the grade of LT who fails twice to LCDR is involuntarily discharged or retired. The Board finds that because the erroneous second disputed OER resulted in the applicant failures of selection for promotion and his eventual involuntary retirement, he should be returned to active duty. See *Germano v. United States*, 26 Cl. Ct. 1446 (1992); *Engels v. United States* at 180 (reinstating officers to active duty whose involuntary discharges were the result of having twice failed of selections due to prejudicial inaccurate records). Therefore, the Board agrees with the Coast Guard that the applicant should be reinstated on active duty.

Ancillary Issues

18. In his response to the advisory opinion, the applicant asked the Board to change the date on his Marine Safety Professional Insignia to July 2004 from May 26, 2006 when it was allegedly approved. He also asked belatedly to have his Foreign Vessel Qualification entered into his record. The Board will not rule on either of the requests because the Coast Guard has not had an opportunity to comment. The Board will advise the Coast Guard to review and consider the requests, and if appropriate, comply with the applicant's request. If no action is taken on the request for a corrective date for the applicant's completion of the Marine Safety Professional Insignia or the request to enter the Foreign Vessel Qualification into his record, the applicant may reapply to this Board. The Coast Guard shall advise the applicant within 90 days from the date of this decision whether it will correct his record in this regard.

19. With regard to the applicant's request for tuition reimbursement, the Board has insufficient evidence that the applicant is owed any money in this regard. He is encouraged to submit his request for such reimbursement and any proof to the appropriate Coast Guard officials for consideration. If such request is denied, the applicant may reapply to this Board.

20. All of the applicant's allegations have been considered. Those not discussed within the findings and conclusions are not considered dispositive of the issues in this case.

Conclusion

21. Accordingly, the Board finds that the applicant's second disputed OER should be removed and replaced with a Continuity OER. The Board further finds that his two failures of selection for promotion to LCDR should be removed from his record and that he should have two new opportunities to complete for promotion to LCDR. If he is selected for promotion to LCDR by the first Board that considers him with a corrected record, he should have a date of rank commensurate with that Board or a date of rank commensurate with the PY 09 selection board, at his discretion with back pay and allowances. If he is selected for promotion to LCDR by the second board, he shall receive a date of rank commensurate with that board. Finally, the Board finds that the applicant should be reinstated to active duty, with back pay and allowances, subject to appropriate off-sets.

ORDER

The application of XXXXXXXXXXXXXXX, USCG (Ret.) for correction of his military record is granted in part, as follows:

The OER for the period January 1, 2002 to January 31, 2003 shall be corrected by changing the date in block 1.m. (OER submission date) to January 10, 2003.

The OER for the period February 1, 2003, to June 30, 2004, shall be removed from the applicant's record and replaced with a report for continuity purposes only.

The applicant's [REDACTED] [REDACTED] [REDACTED] failures of selection for promotion to LCDR shall be removed from his record and he shall have two more selection opportunities for promotion to that grade. If he is selected for promotion to LCDR by the first Board to consider him with a corrected record, he shall receive a date of rank commensurate with that board or a date of rank commensurate with the [REDACTED] LCDR board, at his discretion, with back pay and allowances once promoted. If the applicant is selected by the second board, he shall receive a date of rank commensurate with that Board.

The applicant's involuntary retirement shall be removed from his record and he shall be reinstated on active duty, if he desires. Within a reasonable time, but not to exceed sixty days from the date of this decision, the Coast Guard shall offer the applicant the opportunity to be reinstated on active duty. Such reinstatement shall be at a time convenient to the applicant and Coast Guard, but must be completed within six months from the date of this decision. The applicant's record shall be further corrected to show that he was never discharged from active duty. He shall receive back pay and allowances, subject to appropriate off-sets.

All other requests for relief are denied.



