

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2012-109

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XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case upon receipt of the applicant's completed application on March 29, 2012, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 21, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by removing or amending an officer evaluation report (OER) covering his service as the [REDACTED] of a cutter from May 24, 2008, to July 5, 2009, and, if removed, by replacing it with a Continuity OER. The applicant alleged that the disputed OER was prepared in violation of the Personnel Manual in effect in 2009 because the Reporting Officer, who was the commanding officer (CO) of the cutter, improperly pressured his supervisor, the Executive Officer (XO) of the cutter, to assign him lower marks than the XO thought he should receive.

The disputed OER, which is attached, shows that the applicant received high marks of 5 and 6 in many performance categories.¹ However, from his supervisor,² the XO, the applicant received average marks of 4 for "Developing Others," "Directing Others," and "Workplace Climate" and a just above-standard mark of 5 for "Results/Effectiveness." The XO did not include any negative comments in his portion of the OER. The CO assigned the applicant a below-standard mark of 3 for "Responsibility," supported by the following comment in block 8: "Unfortunately failed to provide timely feedback to subordinates that may have prevented their

¹ In OERs, officers are evaluated in 18 different performance categories, such as "Professional Competence," "Teamwork," and "Initiative," on a scale of 1 to 7, with 7 being best.

² An officer is evaluated by a "rating chain" of three superior officers, including a supervisor, who completes the first 13 marks on the OER; a reporting officer, normally the supervisor's supervisor, who completes the rest of the OER; and an OER reviewer, who reviews the OER for consistency and comportment with regulations.

missteps in perpetuating inappropriate [and] unprofessional conduct; inaction created a presumption that behavior was acceptable.” The CO recommended the applicant for promotion but assigned him a mark in the fourth spot on the officer comparison scale,³ which denotes merely a “Good performer; give tough, challenging assignments.”

The applicant noted that other crewmembers’ OERs suffered from the same problem of undue influence and that this Board or the Personnel Record Review Board (PRRB) has granted relief to them by removing their disputed OERs. *See* final decisions for BCMR Docket Nos. 2011-082 and 2011-035.

The applicant alleged that the CO’s mark of 3 for “Responsibility” and supporting negative comment in block 8 are erroneous, unjust, and not based on direct observations or reliable reports of others, as required by the Personnel Manual. He said they are erroneous because he did, in fact, provide timely feedback to his subordinates in the situation addressed by the comment.

The applicant explained that the CO’s comment concerns a bridge “quote book” that was started on the cutter in 1999, long before he came aboard in 2007. He was unaware of the quote book until the ██████████ brought it to his attention in the summer of 2008. The ██████ told the applicant that he intended to remove the quote book from the bridge and sought the ██████ support. The applicant alleged that the ██████ did not tell him that the book contained inappropriate language or content but said that it should be removed “to increase the professionalism of the bridge watch and suggested the book might be a distraction to maintaining a proper watch on the bridge.” However, the ██████ was a senior Deckwatch Officer and had been the ██████████ responsible for maintaining the bridge equipment, logs, and manuals, so the applicant trusted his recommendation. The ██████ left the book on the applicant’s desk “where it remained for a day or two during which time I did not review it as I was focused on conducting the operations of the patrol we were conducting.” The applicant alleged that the ██████ removed the book a few days later, and the applicant assumed the book was not going to be returned to the bridge.

In early spring of 2009, however, the CO brought the quote book to an Officer’s Call and said it contained many inappropriate entries made by past and present members of the crew. She was very upset about the content of the book but did not let him see it. After the meeting, the applicant met with the CO and XO about the book, and they agreed that he should counsel the ██████ and other subordinates in the ██████████ to ensure that they understood the content of the book was inappropriate. The CO did not mention any need for punishment. The applicant said that he promptly followed through by meeting with his subordinates to counsel them about the quote book.

³ On an OER Comparison Scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout her career. Although the marks on the scale are not numbered, there are 7 possible marks, which range from a low of “unsatisfactory” for a mark in the first spot on the scale to a high of “a distinguished officer” for a mark in the seventh spot. A mark in the third, fourth (middle), or fifth spot on the scale denotes the officer as “one of the many competent professionals who form the majority of this grade.”

Later that spring, after he prepared the supervisor's portion of his subordinate officers' OERs, the XO told him that the CO said the marks he assigned were too high and should be lowered because of the circumstances surrounding the quote book. Moreover, the XO told him that "failing to do so could negatively affect my own marks since the CO would not approve the marks I initially submitted."

The applicant alleged that when he received a copy of his own OER in July 2009, he did not contest it because he thought that doing so would only lead to further problems and potentially delay his departure for his next assignment, which was post-graduate school. However, the mark of 3 is erroneous and unjust and should be raised to a 6 because if the CO's erroneous supporting comment is removed, the rest of the comments support a mark of 6.

The applicant also alleged that the low mark of 3 for "Responsibility" is erroneous because the disputed OER contains some comments that reflect positively on his responsibility: "Held second chance first term accountable upon return to unit, member now w/ clear document[ed] performance goals [and] expectations, well on way towards re-earning trust. Held division accountable for [REDACTED] miscue, responsibly focused on lessons learned." Moreover, he argued, if he had actually been irresponsible, as indicated by the low mark, he would have been removed as the [REDACTED], because that position was responsible for 35 subordinates divided among the [REDACTED], especially since the cutter was going on a law enforcement patrol and undergoing Tailored Annual Cutter Training.

The applicant alleged that the supporting comment for the low mark—"Unfortunately failed to provide timely feedback to subordinates that may have prevented their missteps in perpetuating inappropriate [and] unprofessional conduct; inaction created a presumption that behavior was acceptable"—is also erroneous because as soon as he was informed of the inappropriate nature of the quotes in the quote book he did promptly counsel his subordinates as directed by the CO.

The applicant also alleged that the marks of 4 for "Developing Others," "Directing Others," and "Workplace Climate" and the mark of 5 for "Results/Effectiveness" are erroneous and unjust because the XO was directed by the CO to lower these marks. The applicant noted that there are only positive comments supporting these marks and alleged that the comments support higher marks in these categories. The applicant alleged that based on the comments in the OER, he should have received the highest mark, a 7, for "Results/Effectiveness," which is the mark he had received in his immediately preceding OER for this performance category.

The applicant alleged that he should have received a mark of 6 for "Developing Others." He alleged that the supporting comments entered by the XO meet the written standard for a mark of 6. He noted that he had previously received a mark of 5 in this category but that his responsibilities had significantly increased in the reporting period for the disputed OER and the comments show that he was very successful in developing other despite the increased responsibility.

The applicant alleged that he should have received a mark of 6 for "Directing Others." He alleged that the supporting comments entered by the XO meet the written standard for a mark

of 6. He noted that he had previously received a mark of 5 in this category but that his responsibilities had significantly increased in the reporting period for the disputed OER and the comments show that his direction of junior officers and other subordinates resulted in exceptional results, such as a significant cocaine seizure, saving 318 lives from unsafe vessels, twice terminating illegal fishing operations, and flight deck recertification.

The applicant alleged that the mark of 4 for “Workplace Climate” is erroneous and based on his supposed failure to interdict the quote book even though he supported its removal from the bridge when he first learned about it. The applicant noted that he had received a 6 in this category on his prior OER and that none of the supporting comments for the mark reflect a decline in his performance in this area.

The applicant alleged that the mark in the fourth spot on the officer comparison scale should be raised to the fifth spot, which denotes an “Excellent performer; give toughest, most challenging leadership assignments.” He alleged that if other marks on the disputed OER had not been erroneously and unjustly lowered, his marks in the performance categories would have supported a mark in the fifth spot. The applicant also alleged that the CO’s comments about his leadership potential in block 10 support a mark in the fifth spot on the comparison scale. Moreover, he argued, because he was already serving as the [REDACTED] of a medium endurance cutter, the CO’s comments that he was prepared for “more challenging positions” and “exhibited multi-tasking skills and vast operational knowledge” logically correspond to a mark denoting that, in comparison with his peers, he was ready for the most challenging leadership assignments.

Therefore, the applicant asked the Board to correct the disputed OER by removing the erroneous comment and raising the assigned marks as requested. However, he asked, if the Board decides that any of these particular corrections cannot be made, he wants the Board to remove the entire OER from his record and have it replaced with a Continuity OER.

In support of these allegations, the applicant submitted copies of the disputed OER, his previous OER, prior decisions of the PRRB and BCMR in his subordinates’ cases (they submitted statements authorizing his use of them), and some of the evidence submitted in those cases. The witnesses’ statements summarized in the BCMR’s prior decisions on this matter are incorporated in this decision by reference.

In BCMR Docket No. 2011-082, the [REDACTED] stated that in 2008, he consulted the [REDACTED] about issues he was having with a fellow junior officer and gave the [REDACTED] the quote book because it contained examples of the problems that were causing him concern. The [REDACTED] alleged that he told the [REDACTED] that he had removed the quote book from the bridge because of its questionable content, but that someone took it from him without his consent at the direction of the other junior officer and returned it to the bridge. The [REDACTED] gave the quote book to the [REDACTED] to review and also consulted members of the Chiefs’ Mess about how to handle the matter. As a result of the consultation with the Chiefs, he told the [REDACTED] that he thought the quote book should be removed from the bridge and quotations could be recorded on the back of the wake-up log book for a while. The [REDACTED] agreed, and the [REDACTED] took the quote book since he intended to create a new one without the offensive content. However, in April 2009, while he and several other junior officers were off the cutter for five days pursuant to the board of a fishing vessel, someone removed the

quote book from his stateroom without his consent or knowledge and returned it to the bridge, where the CO found it shortly thereafter.

The only pages of the quote book in the Board's possession are two pages submitted by the CO for a prior case. The first page contains quotations entered in the book in early 2008 before she took command of the cutter:

During G.E: SN [name] is explaining that he never gets in trouble when he gets drunk. Mr. [name] asks "What about getting anybody pregnant?" [SN]: "Well, I got a"

During flight quarters: Captain: "What do you call it when you have meridian passage of the moon?" Nobody answers, so he says, "Local apparent moon." A few chuckle. BM [name] says: "Captain, those were sympathy laughs."

29 Feb. ██████████ enters the bridge and quotes BM3 [name]: "How's it goin ... "[m.f.] [name]?" BM3: "Alright but I gotta get a relief soon so I can go take a shit." ██████████ "Why wait BM3?" BM3 [name]: "Eh, I'll go when it hits the crack of that ass ... that's when I know it's time."

01 MAR 08 – Mid watch

██████████ to ENS ██████████: "I'm not trying to impress you, [name]. I'm trying to break world records here."

The second page that the CO submitted bears the heading "MAR – MAY '09" and contains the following quotations, which appear to have been entered by just two people, one who wrote the heading and made the first four entries and another who made the last two entries:

- BM1 [name]: "[name] was ... and praying."
- BM3 F: "Man, you try to find someone to help me out, so I can go to this meeting, and no one is around. But, if someone needs a relief to go to something, they come find my black ass."
- CIC [name]: "Chupacabra, Shark 01, I have you soft and broken." OOD: "Ouch that sucks."
- BM2 H: (Answers phone on bridge.) "Hello. You want to do what with the boom?" (Hands phone to OOD.) "It's [name], I don't know what he is saying."
- ██████████: "I [unreadable word] at the chart."

14 APR '09: BM2 H: "Sir, I could definitely see you being sold into sex trafficking." ██████████ "Quote book."

VIEWS OF THE COAST GUARD

On August 14, 2012, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief by removing the disputed OER and replacing it with a Continuity OER. In making this recommendation, the JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

PSC's Memorandum

The PSC submitted sworn declarations signed by the applicant's rating chain, which are summarized below, and in light of those declarations concluded that the rating chain did not carry out its duties properly under the Personnel Manual. The PSC stated that the XO's declaration shows that he was improperly directed by the CO to lower marks he had assigned to the applicant when drafting the disputed OER and would have assigned higher marks in several categories "had he not felt compelled to provide marks" that the CO would accept. "It is clear to PSC that [the XO's] sections [of the OER] do not document an independent view. This goes against the intent of, and is in violation of, the OER [officer evaluation system]."

PSC noted that the CO is adamant in her declaration that she did not direct the XO to lower the applicant's marks. PSC "believes the influence [the XO] felt came from a series of disputed evaluations from officers during the 2009 timeframe" aboard the cutter. "While the [CO] continues to declare that she never unduly influenced others in completing evaluations, [PSC] yields to several BCMR and PRRB decisions where others have disagreed and subsequently ordered removal of evaluations from officers' records." PSC stated that it is reasonable to believe both that the CO did not expressly direct the XO to lower the applicant's marks and that the XO, nonetheless, felt influenced to submit lower marks than he thought were deserved.

PSC stated that the XO should have assigned the marks he thought the applicant had earned and noted that the CO had the opportunity in block 7 of the OER to express her agreement or disagreement with the marks and comments assigned by the XO. PSC stated that if the XO had assigned marks in accordance with the OES, the disputed OER would likely have contained higher marks in the XO's section and appeared quite different, but because the CO would have had the opportunity to comment on the XO's section, PSC cannot state whether the resulting OER would have been more positive or negative than the disputed OER.

Regarding the disputed marks and comment assigned by the CO, PSC stated that the applicant has submitted insufficient evidence to refute them. PSC noted that officers' marks are supposed to reflect their performance during a particular reporting period and so do not necessarily reflect a trend.

PSC concluded that there is enough evidence to overcome the presumption of regularity with respect to the preparation of the disputed OER, "and coupled with precedence from prior BCMR and PRRB findings, there is a basis for removing the OER" because the XO failed to carry out his responsibility as the applicant's supervisor to provide an independent evaluation. PSC stated that the entire OER should be removed from the applicant's record and replaced with a Continuity OER because raising the marks assigned by the XO in his section would render the CO's concurrence and comments in block 7 erroneous.

Declaration of the XO of the Cutter

The XO of the cutter, who prepared the supervisor's portion of the disputed OER, stated that he had no knowledge of the quote book until the CO brought it to his attention in the spring of 2009 and she refused to let him see the entries in it or to tell him who wrote the objectionable

comments in it. When he discussed the book with his subordinates, the applicant told him that the [REDACTED] had brought him the quote book in the summer of 2008 and that it had sat on his desk for a couple of days, but he did not read it because he did not think it was a pressing matter. Because the [REDACTED] had said he was going to remove it from the bridge, the applicant did not think that the quote book would be returned to the bridge after the [REDACTED] retrieved it.

Regarding the disputed OER, the XO said that the CO did influence him to lower the applicant's marks "to some degree." She did not specify exactly what marks the XO should assign but told him that the [REDACTED]

was responsible for [the] perceived performance shortfalls of those in his department. It is my opinion that the shortfalls that the [CO] perceived were heavily influenced by some of the entries she saw in the quote book. Since she did not permit me to read the book, I [did] not have knowledge of the specific inappropriate behavior in which she perceived the crew engaged. I had at least one discussion with the [CO] regarding [the applicant's] OER and his overall performance in which she made it clear that [his] inaction when presented the quote book was inexcusable and indicative of his lack of leadership.

Regarding the disputed marks, the XO said that for "Results/Effectiveness," "Developing Others," and "Workplace Climate," he would have assigned the applicant higher marks but assigned him the highest marks in those categories that he thought the CO would accept. He said he would have assigned the applicant a 6 for "Results/Effectiveness," a 6 for "Developing Others," and a 5 for "Workplace Climate." He did not address the applicant's complaint about the mark of 4 for "Directing Others."

The XO noted that while the CO was responsible for the mark of 3 for "Responsibility," the supporting negative comment, and the comparison scale mark, the CO had him draft her section of the disputed OER for her, he drafted it knowing that expected the OER to hold the applicant accountable for the circumstances surrounding the quote book, and she adopted his draft with little revision. However, the XO strongly believes that the mark of 3 for "Responsibility" does not reflect the applicant's actual performance and that the applicant "had no part in the perpetuation of any inappropriate or unprofessional conduct" as stated in the OER comment. The XO stated that he spent far more time on the bridge than the CO and "never witnessed any inappropriate behavior or unprofessional conduct."

Regarding the comparison scale mark, the XO stated that, while it is a subjective mark assigned by the CO, it was influenced by the CO's erroneous perception that the applicant had perpetuated inappropriate and unprofessional behavior on the bridge. The XO stated that he thinks that the applicant performed well enough in one of the most challenging LT assignments in the Coast Guard to merit a mark in the sixth spot on the comparison scale as an "exceptional officer."

Declaration of the CO of the Cutter

The CO, who served as the reporting officer for the disputed OER, stated that she did not direct the XO to change any mark or comment that the XO entered in his section of the applicant's evaluation. The CO stated that she believes that the OER is an accurate reflection of the applicant's performance during the reporting period.

The CO stated that the quote book was maintained on the bridge of the cutter and that the applicant was frequently on the bridge while the cutter was in port and underway. [REDACTED] The quote book "contained references to perverted, disgusting, and unprofessional behavior in direct opposition to Coast Guard core values. The book detailed sex acts, including masturbation, bestiality and oral sex. The book documented disrespect from officers to enlisted members and from enlisted members to officers." The applicant was in a position to stop such behavior and admitted that in 2008, the [REDACTED] had approached him to discuss what to do about the book. However, the applicant took no action and therefore failed his subordinates by not stopping their unacceptable practice.

The CO alleged that the applicant's claim that he did not review the quote book is false. The [REDACTED] told her that when he gave the quote book to the applicant, he discussed the contents with him. At some point the [REDACTED] got the book back from the applicant, who "never directed that the practice of documenting unprofessional behavior be stopped." The CO alleged that the quote book "was actively maintained" until she discovered it on the bridge in April 2009.

The CO wrote that she had several conversations with the applicant about the quote book, and he never denied knowledge of the presence or content of it. Instead, the applicant told her that he "didn't think it was a big deal." Therefore, she wrote him an administrative letter of censure. She submitted a copy of the letter, which states that the applicant's "knowledge of the book, failure to stop the quote book coupled with the behavior detailed in the book shows a grave lack of judgment and lapse in our core values" and that he had "failed to provide timely feedback to your subordinates that may have prevented their missteps." The applicant told her he thought the administrative letter of censure was unduly harsh.

The CO stated that the disputed comment in block 8 of the OER "is true, based on information accumulated during the reporting period, and should remain." She cannot recall the applicant ever counseling other officers about the book, and she presented them with administrative letters of censure too.

The CO stated that the laudatory comments in the OER show that the applicant's performance as [REDACTED] was acceptable. She stated that the OER marks were based on his performance throughout the reporting period and cited the following examples of poor performance justifying the assigned marks:

- She was the first female CO aboard the cutter and the only female on board when she took command in June 2008. Before the first [REDACTED] brief she attended, the applicant, who led the briefs, told her that "certain [REDACTED] terms were reviewed at each

brief for professional development.” The term chosen for review at her first brief was “hooker.”

- During the reporting period, the CO’s computer files “became public without my permission or knowledge.” The applicant was notified but failed to tell her, but at ET2 told her. The applicant took no action to learn how the lapse in computer security had happened until she told him to.
- Concerns were raised about the health, well-being, and finances of a crewmember with a top secret security clearance. The CO met with the applicant and others and adopted a plan of action. When the plan of action was not carried out, she asked a chief petty officer why not, and he told her that the applicant had told him not to carry out the plan.
- Personnel in the [REDACTED] had numerous disciplinary problems that were addressed at mast. Two chief petty officers were not recommended for advancement and were almost placed on performance probation, and a petty officer lost his access to classified information and was ultimately arrested by local police after barricading himself in his home with weapons.
- The Chief’s Mess on the cutter told her that the applicant was insensitive and abrupt with the crew and “did not promote an environment of open communication and respect.”
- Coast Guard policy and procedures were not always followed in the [REDACTED]. Personal protective equipment was not worn as required, logs were not properly maintained in the Weapons Division, and “during training, a weapons system was not handled properly which resulted in non-eligibility for a unit level award.”
- Following a [REDACTED] the applicant presented to her for approval a law enforcement package with “notes written on the back of a Pop Tart box.”

The CO noted that she vehemently disagrees with the relief granted in the BCMR’s and PRRB’s prior cases. She alleged that relief was granted in those cases based on “factually incorrect statements” provided by the applicant and the XO. She averred that she had never directed a subordinate officer to change assigned marks or comments on an OER but had, as authorized by policy, returned draft OERs for reconsideration and corrections of errors, omissions, and inconsistencies.

The CO stated that the applicant’s claim that he could not discuss the disputed OER with her is “baseless and false” because he had discussed difficult topics with her in the past and she always maintained professional communications. She stated that the XO often discussed the applicant’s performance with her and expressed his frustration with it. Moreover, the XO fully participated in giving the applicant the letter of censure and himself contacted the Officer Personnel Management Branch of PSC and described the quote book matter as “a significant emotional event” for another junior officer (for whom the PRRB granted relief). She submitted a copy of an email in which someone from PSC mentioned that the XO had described it that way.

The CO stated that during the reporting period she discussed with the XO her expectations of the OER process, the standards in the Personnel Manual, and the purpose and use of “do not concur” comments in block 7 and Reviewer comments. She remembers telling him, “I don’t want any funny business,” by which she meant that she wanted him to follow the standards. The XO indicated that he understood her. Moreover, the CO alleged that she had retained “legal counsel to assist me in drafting charges for the Convening Authority to take action against [the applicant and the XO’s] false statements.

The CO alleged that the OES was sound on the cutter. Based on OERs she provided, other officers on the cutter had been promoted and received orders to serve as the COs and XOs of other cutters and to attend flight school. “These officers were marked with the same integrity to the OES as [the applicant] was marked.”

Declaration of the OER Reviewer

The Deputy Chief of Atlantic Area Cutter Forces served as the reviewer of the disputed OER. He stated that he believes that the applicant “is of great character and a fine Coast Guard officer.” He did not observe the performance discussed in this application and was “a bit surprised” when he saw the applicant’s OER but followed the procedures for reviewing OERs in the Personnel Manual.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 24, 2012, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to reply within 30 days. No reply was received. (The applicant was selected for promotion to lieutenant commander in July 2012 with the disputed OER in his record.)

SUMMARY OF THE REGULATIONS

Article 10.A.1.b.1. of the Personnel Manual states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Article 10.A.2.a. states that an officers “rating chain [supervisor, reporting officer, and reviewer] provides the assessment of an officer’s performance and value to the Coast Guard through a system of multiple evaluators and reviewers who present independent views and ensure accuracy and timeliness of reporting.”

Article 10.A.4.c.4. of the manual provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completing the last 5 marks in Article 10.A.4.c.7.):

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

• • •

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

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. ...

• • •

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

Article 10.A.4.c.8.a. states that on the comparison scale in an OER, a reporting officer “shall fill in the circle that most closely reflects the Reporting Officer’s ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known.

Article 10.A.2.e.2.c. states that a reporting officer “[e]nsures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor’s submission is found inconsistent with actual performance or unsubstantiated by narrative comments. The Reporting Officer **shall not direct** that an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.)”

FINDINGS AND CONCLUSIONS

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

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

2. The applicant asked the Board to correct or remove from his record his OER for the period May 24, 2008, to July 5, 2009. The Board begins its analysis by presuming that a disputed OER in an officer’s military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.⁴ Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.⁵ 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

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

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

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.⁶

3. The applicant has alleged and proved by a preponderance of the evidence that the disputed OER was prepared in violation of Article 10.A.2.a. of the Personnel Manual because his supervisor, the XO, failed to exercise his independent judgment in assigning the applicant marks in the disputed OER and instead assigned the applicant only the highest marks the XO assumed—apparently without proof—that the CO would accept. The XO has executed a sworn statement admitting this fact. Because the XO admits that he assigned the applicant lower marks than he thought the applicant deserved, the Board finds that the OER was adversely affected by a prejudicial violation of a regulation.

4. The applicant also alleged that the disputed OER is inaccurate as an assessment of his performance during the reporting period. He alleged that the laudatory comments support higher marks in certain categories. However, under Articles 10.A.4.c.4. and 10.A.4.c.7. of the Personnel Manual, OER marks are not based on the comments. Instead, the rating chain members review the written standards for the marks on the OER form and assign marks by comparing the officer’s overall performance with the written standards. The OER comments are supposed to support the assigned marks by providing examples of how the officer met the written standards. The Board finds that the positive comments in the disputed OER are not so laudatory that they are clearly inconsistent with the assigned marks. In this regard, the Board notes that a mark of 4 in each performance category means that the officer met the “expected standard of performance.” Therefore, even very laudatory comments are not inconsistent with a mark of 4 or 5.

5. The applicant alleged that the mark of 3 for “Responsibility” and the CO’s supporting comment are erroneous and unwarranted because he had supported the ██████’s decision to remove the quote book from the bridge in 2008, he was unaware the book had been returned to the bridge in April 2009, he did not know how inappropriate the comments in the quote book were until the CO informed him, and he promptly counseled his subordinates in response to that information. The applicant’s description of events regarding the quote book is very similar to that provided by the ██████ for BCMR Docket No. 2011-082, which the ██████ allowed the applicant to use. The CO based the mark and her comment on the fact that the applicant did not disclaim knowledge of the existence of the quote book. However, as the Board noted in that prior decision, a witness, ██████ “stated that after establishing that the applicant and others knew about the book, the CO ‘did not really want to hear what anyone had to say, and she asked generic questions such as, “How did we get here and how do we proceed?’””

6. Because the Board has already found that the disputed OER was prepared in violation of Article 10.A.2.a. of the Personnel Manual, however, it is not necessary to determine whether all of the applicant’s allegations are true. As the Coast Guard stated, if the XO had prepared his own marks and comments independently and differently, as he stated he should have, the CO’s section of the OER would likely also have been different. Although the XO has supported some of the applicant’s claims about what his marks would have been had the XO properly prepared the OER, the Board cannot reasonably correct the OER to appear as it would

⁶ *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).

have had the XO not believed that he had to assign lower marks than he thought the applicant had earned. In BCMR Docket No. 151-87, the Board found that an OER should “not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.” In this case, the Board finds that much of the report is infected by the XO’s error and that it is impossible to sever the incorrect and unjust material from the appropriate material. Therefore, it should be removed from his record in its entirety and replaced with a Continuity OER.

7. Therefore, relief should be granted by removing the disputed OER from the applicant’s record as the Coast Guard recommended.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

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

The Coast Guard shall remove from his record his OER for the period May 24, 2008, to July 5, 2009, and replace it with an OER prepared for continuity purposes only with the same description of duties in block 2.

