

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 35-97

DECISION OF THE DEPUTY GENERAL COUNSEL

☒ I approve the Majority Opinion of the Board.

☐ I approve the Minority Opinion of the Board.

DATE:

March 4, 1998



Rosalind A. Knapp
Deputy General Coun
Delegate of the Secretary
Department of Transportation

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 35-97

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10, United States Code. It was commenced on December 11, 1996, upon the Board's receipt of the applicant's application for correction.¹

The Board reached a recommended final decision in this case on January 30, 1998. Two of the three duly appointed members, the majority, voted to grant relief. One member, the minority, voted to deny relief.

The applicant, a retired chief warrant officer - W2 (CWO2) asked the Board to correct his military record by removing a special officer evaluation report for January 1, 1995, to April 14, 1995 (special OER). He also asked for the following additional relief:

Setting aside the Selection Board action of 12 Feb 1996 denying the [applicant] selection for promotion to CWO3 (ENG).

Authorizing promotion of the [applicant] to Chief Warrant Officer Third (ENG), with a date of rank of 1 Aug[ust] 1996, along with all appropriate back pay and allowances.

[A]ny and all other administrative remedies that this Board may deem appropriate to correct the injustice done unto the [applicant] in this case.

The applicant retired on [REDACTED] after twice failing of selection for promotion to CWO3 (ENG).

EXCERPTS FROM RECORD AND SUBMISSIONS

Prior to filing his application with the BCMR, the applicant submitted a request to the Personnel Records Review Board (PRRB). The PRRB revised two of the

¹ The final decision is due in the case on February 13, 1998. The original due date was extended because the applicant was granted an extension to reply to the views of Coast Guard.

comments in the special OER, but changed none of the marks. The OER as initially submitted will be discussed below with the changes by the PRRB noted in boldface.

The special OER was written to document performance that was dramatically different from that in the previous reporting period. In all dimensions but one (block 3d.), the applicant was rated as either a 3 or 4. He was rated as a qualified officer (a mark of 2 out of a possible high of 7), in block 12.

The supervisor wrote in block 3.h., in part, as follows: "as Engineer Officer and department head does not take full responsibility for operational readiness of engineering plant, damage control, and safety. . . . Needed excessive prompting to take appropriate action to reduce current levels on board, even after MISHAP where crewman displayed negative side effects from overexposure. Engineering plant rated average by MLC Technical Assessment team leader. **(The PRRB changed this line to read "Engineering plant rated above average by MLC Technical Assessment team leader.")** . . . Assignments are usually completed well ahead of deadlines, often the same day. 30% of discrepancies during MLC Technical Assessment corrected in one week."

The supervisor wrote the following in block 4.c. of the OER: "Conduct has shown little improvement after previous counseling concerning inappropriate comments/gestures, documented in OER from marking period 01 January 1994 to 01 July 1994. Subject of inappropriate comments/gestures has more recently stated that unwanted behavior occurred again. Failed to keep a tions and behavior above question." **(The PRRB rewrote this portion to read as follows: "Failed to keep actions and behavior above question. During this marking period the wife of his subordinate stated that [the applicant] made inappropriate comments and gestures towards her.")**

The reporting officer wrote the following comments in block 11: "[The applicant] is not recommended for further assignment as an Engineer Officer, or any position of equal or greater responsibility. On numerous occasions he has failed to provide me with accurate information on his people and his plant. His reports to me during machinery casualties are typically disorganized and do not contain the information I need to make operational decisions. He has repeatedly failed to support command policies and has not functioned as a team player. [The applicant] is not recommended for promotion."

The Applicant's Allegations

The applicant stated that the reporting officer displayed a marked prejudice against him from the moment that she assumed command of the cutter. The applicant alleged that the special OER did not accurately reflect his performance and was the product of personal prejudice against him by the reporting officer. He claimed that the

personal prejudice against him by that officer was so pervasive and onerous that she could not be expected to fairly evaluate his performance.

The applicant further alleged that the climate aboard the cutter was one of low morale, and of fear and tension. It was fostered by the actions of the reporting officer. The applicant claimed that it was his intervention, on behalf of the crew, in the following incident that finally led the CO to write the special OER. The applicant stated that the reporting officer, who was also the CO of the cutter, had prohibited the crew from watching "Baywatch," a television show. According to the applicant, one day the CO happened to catch "Baywatch" showing on a TV on board the cutter, she became upset and canceled tropical hours, a type of liberty. The applicant stated that members of the crew asked him to intercede with the reporting officer. The applicant stated that he spoke with the Group Engineer about the matter and the Group Engineer took the matter up with the Deputy Group Commander. The applicant claimed that the reporting officer was counseled by her superiors on this issue.

The applicant claimed that the special OER is inconsistent with his previous and subsequent performance evaluations. The applicant stated that prior to receipt of the special OER he had received five other evaluations, while assigned to this cutter. The last of these previous evaluations was written by the supervisor and reporting officer for the special OER. In that prior evaluation, the supervisor complemented the applicant on his strong work ethic, concern for the well-being of his department, effective use of personnel, planning and foresight, and interaction with others both within and outside the command. The applicant stated that four months later, in the special OER, the supervisor "damns" him for not assuming responsibility for his department, poor planning and a lack of concern for his personnel, for not communicating well with other engineers, and for inappropriate comments and gestures. The applicant stated that one is left to wonder if the command is marking the same individual in the prior and special OERs.

The applicant claimed that the reporting officer's prejudice against him is manifested in the special OER by inaccurate comments that she either wrote herself or caused other members of the rating chain to write by providing them with inaccurate information. The applicant stated that the comment with respect to inappropriate comments and gestures is inaccurate and refers to an alleged incident between the applicant and the wife of an MK1, his subordinate. The applicant obtained a statement from the wife of the MK1. She wrote as follows:

[The reporting officer] called and set up a conference with me over lunch. The blunt (sic) of the conversation was concerning [the applicant]. I told [the reporting officer] that there was two incidents over the last 7 months but neither was of a sexual or harassing nature. The first was a comment about my orange coat. I was on the pier with my husband, [the applicant] said something like nice coat, it hit me wrong and I got upset. The other incident was on the phone. I called for my husband and [the applicant]

answered the phone; when I asked for my husband, [the applicant] said "say please" with a laugh and I didn't like that and got upset. I have had many uneventful encounters with [the applicant] during this time when he was polite and very professional.

The applicant also submitted a statement from the MK1:

[The applicant] and my wife have had differences in the past . . . my wife has stated that there is a personality conflict between [them]. My wife has told me about the CO calling her asking for a statement from her pertaining to [the applicant]. She has told the CO that all conflicts have been settled and refused to write a statement. The CO has even approached me about the issue and told me I ought to do the "Husband" thing and talk to [the applicant] about their issue. I have been present when all of the comments have taken place. I as the husband, was not offended by [the applicant's] comments, one was about her bright orange coat, the other was on the phone.

The applicant also submitted a statement written by his attorney's assistant describing a telephone conversation the assistant had with the MK1. The attorney's assistant wrote that the MK1 told him that after the MK1's wife dropped the charges, the reporting officer told the MK1 that if the wife would reinstate the charges, the reporting officer would "take [the applicant] to the hilt."

The applicant stated that the special OER was preceded by a letter, dated April 3, 1995, from the reporting officer to the Group Commander, requesting the applicant's relief for cause as the cutter's engineering officer (EO). The applicant claimed that this letter also contained inaccurate information, which he states further demonstrated the reporting officer's prejudice against him. In addition to inaccurately reporting that the applicant made inappropriate gestures and comments, the applicant stated that the reporting officer also wrote in that letter that a certain CWO told her that the applicant had a knack of telling the reporting officer what she wanted to hear. The applicant stated that the CWO has denied making that statement.

Other Statements Submitted by the Applicant

1. The applicant submitted a statement from the Chief, Engineering Division, Group/ New York. This individual stated that he worked with the applicant from July 1993 through June 1995. He stated that in April 1995 he became aware that both engineering and morale problems existed on the applicant's cutter. He stated that he discussed them with the applicant and then informed the Group Commander of these problems. He stated that he recommended to the Group Commander that an engineering assessment of the cutter be made to identify and correct any existing problems.

The Chief stated that he had performed several inspections and assessments of the applicant's engineering department and, although there were some problems, the engineering department rated well in all of these assessments.

The Chief, Engineering Division, stated that the cutter underwent an engineering technical assessment. The cutter's engineering division was in good condition and functioning appropriately. He stated that no major discrepancies were found and there was no indication that the applicant was failing to properly manage and administer his division.

2. The applicant also submitted a statement written by his attorney's assistant describing the assistant's telephone conversation with a CWO who was assigned to the cutter during the period under review.² The CWO denied that he told the reporting officer that the applicant "tells you what you want to hear." The reporting officer had used this statement in her letter to the group commander requesting that the applicant be detached for cause.

3. The applicant submitted a statement from a CWO2 who was the Naval Staff Engineer, Support Center New York Industrial. He stated that since December 1992, he was responsible for managing all of the work Industrial did for the applicant's cutter. The CWO2 stated that the applicant was aware of the limits of a small engineering staff, such as his, and he knew where to look for help. He stated that the applicant made optimum use of the low cost Industrial resource and worked closely with Naval Engineering Support Unit to keep his engineering plant in top shape.

The CWO2 stated that personnel from his office responded to a number of requests for repairs from the applicant's unit during his tenure as engineering officer. The most complex of these jobs were repairs to the anchor windlass and the ship's service generator. With respect to the anchor windlass, the CWO2 stated that a hidden grease fitting between the casing and the bulkhead prevented the anchor from falling freely under its own weight. The problem was corrected.

The CWO2 stated that the applicant's actions with respect to repairing the ship's service diesel generators were appropriate. He stated as follows:

[The applicant] first requested a compression test from Industrial, a very logical step in this particular troubleshooting process. The results of the test were inconclusive and [the] head mechanic, an expert with over 40 years experience, was unable to pinpoint the problem without further testing. By this time, [the applicant] had been in contact with a tech rep

² We note that the applicant's attorney submitted statements from the attorney's legal assistant, which describe interviews by the legal assistant with an EMC and the MK1 (both of whom worked in engineering with the applicant) and with a CWO who apparently worked at MLC(vr). We note that these are unsigned by the witnesses and therefore are hearsay. In making our finding, we have relied instead on the signed statements of those with first hand knowledge of events.

from the manufacturer, again knowing where to look for answers. He also asked for assistance from the 378 MAT team, who finally brought in a high tech bore scope which revealed the cause of the problem: severely pitted cylinder liners. The entire troubleshooting process was very logical and well thought out. He then worked closely with the MAT team to restore the generator to service despite the complexity of the repair.

The CWO2 concluded his statement by making the following comments: "During the two and a half years I have been working with [the applicant], I have never known him to be anything other than an efficient manager and a capable engineer."

4. The applicant submitted another statement written by his attorney's assistant describing the assistant's telephone conversation with a chief electrician's mate (EMC).³ The EMC worked for applicant and remained on the cutter after the applicant left the ship. The assistant stated that the EMC told him that morale on cutter was very low. He stated that the CO contributed to the morale problem by canceling tropical hours, a kind of liberty, by preventing the crew from watching TV shows such as "Baywatch," MTV, and videos such as "The Making of the Sports Illustrated Swimsuit Issue." The EMC also stated that the XO stated that all video tapes brought on board the cutter had to be given to the reporting officer for her approval before they could be shown on the cutter. The EMC stated that it was because the applicant spoke to the reporting officer on behalf of the crew about the censoring that the applicant was relieved. The EMC stated that at one point a civil rights complaint was filed against the CO with respect to the "Baywatch" matter.

The EMC stated that he and the crew asked the applicant to speak to the CO/reporting officer after the "Baywatch" incident. The EMC stated that after the applicant spoke to the CO about the incident she started making frequent visits to the engineering department to see what was going on. He stated that after this sequence of events, the applicant was relieved of duty.

With respect to the engineering plant prior to the applicant's relief for cause, the EMC stated that "there were no real problems, just routine minor stuff that happens all the time." He stated that the new EO does not get along with the CO and that the new chief boatswain's mate (BMC) "had it out with the [reporting officer] and walked off the ship and went to the Group XO"

5. The applicant submitted a statement from a lieutenant (LT) who was the Port Engineer, Naval Engineering Support Unit New York from July 1993 until October 1994. He stated that during this time he was involved with two availabilities (repair evaluations) with the applicant. He stated that the applicant's availability planning, preparation and execution were exemplary.

³ See footnote 2 on page 5.

The LT stated that in the Spring of 1994, while the applicant's unit was in a drydock evolution, the reporting officer/CO asked him to spend more time in the shipyard to ensure that work on the cutter was completed accurately and to handle problems as they arose. He stated that he told the reporting officer that he could not accommodate her request and tried to convince the CO that she had a first-rate engineer in the applicant. The LT stated that the reporting officer uttered a disgruntled comment. The LT stated that he did not pay much attention to the comment then, but in retrospect, he believes her comments reflected some "foreshadowing" of an ensuing conflict between the reporting officer and the applicant.

The LT also stated that the XO of the cutter also had problems with the CO. He stated that on several occasions the XO verbally expressed extreme dissatisfaction and frustration about the existence of tension between the command elements. He stated that the XO's feelings toward the CO eventually changed. The LT concluded his statement as follows: "Although [the applicant] may not be the easiest person to get along with he is not incompetent and has never gun decked anything. He perceives a situation, assesses the options, recommends a course of action, but always honors, respects, and obeys the chain of command."

6. The applicant's previous CO/reporting officer submitted a letter on the applicant's behalf. The previous CO stated that the applicant served as his engineering on the same cutter for 18 months. He stated that during that period of time, which included the record-breaking ice season of 1993-94, the cutter met each of its operational requirements. The previous CO further stated, as follows:

Two weeks prior to my departure, [the applicant] was accused of a serious offense and I placed him on report. It was under this cloud that the new CO [reporting officer] and XO received their first impressions of [the applicant]. The charges were subsequently dropped based on an investigation by Group New York. Unfortunately, [the applicant's] relationship with the new CO [reporting officer] was already damaged. During the week of my relief with [the reporting officer], several times she mentioned her dissatisfaction with [the applicant's] personality and the fact that he had been placed on report. She stated to me that "there was something about him that she did not like." I was not surprised that [the reporting officer] was concerned about the allegations and investigation into [the applicant's] conduct. However, I was very surprised that [the reporting officer] decided she did not like [the applicant] after only a few days on board the unit.

The previous CO stated that he believed that the personality conflict between the applicant and the reporting officer culminated in the special OER.

Other Evidence

The applicant received a letter of commendation from the Commandant signed by the Commander, Coast Guard Group New York, his reviewer for the special OER. This letter of commendation recognized the applicant's outstanding performance of duty, in a previous reporting period, as engineering officer for the cutter while it was in drydock from August 1, 1993 to October 22, 1993.

The applicant also submitted a document, dated April 21, 1995, stating that while he was still attached to the cutter the engineering department underwent a "full power Trial." According to this document, all parameters were within those specified by pertinent regulations and manuals.

The applicant submitted a letter dated, February 12, 1996, advising him that he had not been recommended for promotion. The letter informed the applicant that the selection board found that he was not fully qualified for promotion. It attached the following excerpt: "The Board finds [the applicant] not fully qualified for promotion due to a demonstrated lack of leadership, integrity, and commitment to Coast Guard values in that he failed to carry out assigned duties, support command policies, and demonstrated inappropriate personal behavior."

Views of the Coast Guard

The Chief Counsel of the Coast Guard recommended that the BCMR grant no relief to the applicant. The Service argued that even though the PRRB had corrected two comments that it found to be inaccurate or unjust, the remainder of the special OER was not proven to be in error or unjust and it should therefore remain a part of the applicant's Personnel Data Record [PDR].

The Chief Counsel stated that the special OER is valid, even though the supervisor acknowledged that three performance observations documented in his portion of the OER were based on information provided by the reporting officer. The Service stated that supervisors may draw on information from sources other than personal observations to complete an evaluation.

In response to the applicant's allegation that the special OER was in response to his efforts to help the crew with the "Baywatch incident," the Coast Guard stated: "While applicant believes his crew advocacy role, in what he refers to as the 'Baywatch incident,' was just, his wrongful attribution and perpetuation of crew misunderstandings could also be viewed as fomenting controversy and contributing to poor morale. The latter perspective is fostered by supervisor observed leadership weaknesses in Applicant's special OER."

The Coast Guard stated that each OER is an independent snapshot of an officer's performance of a given period. As such, when OERs are viewed from one period to the

next a trend of performance is not necessarily reflected. The Service stated that many of the applicant's performance problems were due to his failure to adjust to new and different expectations of the reporting officer. The applicant's previous CO had a hands-off management style while the CO/reporting officer wanted all the details. The Coast Guard argued the applicant did not seek counsel from the reporting officer about performance expectations. It was his duty to do so.

The Coast Guard provided the following nexus analysis between the applicant's failures of selection for promotion to CWO3 and the alleged errors contained in this application.

Except for the OER ending 940630, wherein Applicant received one mark of 3 in Human Relations dimension, his OERs consistently reflect marks that are above the expected high standard of performance and contain recommendations for promotion. While the selection board's deliberations are confidential [and] no one outside the board members may know the reason an individual was not selected, it is reasonable to conclude that the contents of the contested OER influenced the board's decision. Given an opportunity of selection of 94 percent in December 1995 and 96 percent in December 1996, with the contested OER removed from his record, it is not unlikely he would have been promoted. Thus, if the CGBCMR finds, contrary to the Coast Guard's analysis, that the OER was the result of error or injustice, it should also find that Applicant has established the required nexus between the alleged errors or injustices and his non-selections.

The Coast Guard concluded its comments by stating that the applicant had failed to provide convincing evidence to overcome the presumption of administrative regularity.

The Coast Guard submitted statements from each member of the rating chain for the special OER:

1. The supervisor admitted that three of the statements in his portion of the special OER were obtained from the reporting officer. They are the comment about the engineering department receiving an average rating; the comment to the effect that the applicant failed to keep his actions and behavior above question; and the comment that the applicant did not share information with other WTGB engineering officers. He could not remember the examples of specific instances of the applicant's failure to share information with other engineering officers. The supervisor stated that he believed that each of these statements by the reporting officer was valid.

The supervisor stated that morale was low when the reporting officer relieved the old CO and it improved very little from that point. He stated that because of the CO's and XO's management style, the applicant was resentful.

The supervisor stated that there was a problem with the crew watching certain videos and TV programs. He stated that the "Baywatch" incident was not about that television show, but about the CO's refusal to permit a crew member to watch the video, "The Making of the Sports Illustrated Swimsuit Issue."

2. The reporting officer stated that she is convinced that she took the best action for the ship and the Coast Guard. She stated that there was no discussion between the applicant and herself with respect to either "Baywatch" or the swimsuit video.

3. The reviewer for the special OER wrote that the applicant's problems began shortly before the change of command when the wife of a crew member complained that he had exhibited inappropriate behavior towards her. He stated that he gave the applicant an administrative letter of censure and his grade was lowered in human relations on the appropriate OER for the period.

He stated that he thought the "Baywatch" incident was blown way out of proportion. Also contributing to low morale, was the fact that many crew members thought the applicant had been let off easy with respect to the alleged inappropriate behavior toward a crew member's spouse. The reviewer stated that the bottom line is that the applicant's departure from the cutter coincided with an end to morale problems and to most engineering problems.

The reviewer stated that the applicant had a personality conflict with the reporting officer rather than the reporting officer having a personality conflict with the applicant. He also stated that the applicant had a difficult time dealing with a female in a position of authority over him.

Applicant's Response to the Views of the Coast Guard

The applicant argued that the comments in the Coast Guard's advisory opinion do not rebut the prejudice proved by the evidence submitted by the applicant. The applicant continued to argue for the relief requested in the application. The applicant also submitted three additional statements, one each from the MK1, a BMC and a LT.

1. The MK1 stated that he confirmed his prior statement. He also stated that he and the applicant remain friends.

2. The new BMC wrote a statement, dated July 1, 1997. He stated that he reported to the ship in September 1995. At that time morale was low and the ship's appearance needed a lot of improvement. In his opinion, most of the problems were caused by the command. The BMC stated that he once walked off the ship as a result of frustration in not being able to improve conditions for the cutter's personnel. He stated that he went to discuss the matter with the Deputy Group Commander. The BMC stated that afterwards he learned that the reporting officer/CO would be

transferring the following summer. Since the change of command, the BMC stated that morale, ship's appearance and attitudes have improved. Additionally, he stated that TV programs that were once forbidden could be viewed without a fear of punishment. The applicant stated that he does not know the applicant personally and, therefore, he has no reason to lie.

3. The LT, a woman, was the applicant's supervisor for a period of time after the applicant left the cutter. She stated that she "was placed in authority over [the applicant] and three other warrant officers. Neither [the applicant] nor the other CWOs were uncomfortable with having a former peer, and a woman, as a supervisor."

The LT stated that the applicant was always courteous, professional and responsive. She further stated that his positive attitude was reflected in his above-average evaluations and personal award earned while working as her subordinate.

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. The application is timely.
2. The Chairman has recommended that the case be determined without a hearing. 33 CFR 52.31. The BCMR concurs in that recommendation.
3. A preponderance of evidence shows that the reporting officer for the special OER was biased against the applicant and that bias manifested itself in the OER. The evidence of record shows that the reporting officer's dislike of the applicant began when she first reported to the cutter. The previous CO stated that upon the reporting officer's assumption of command of the cutter, she told him that she did not like the applicant. This statement was made by the reporting officer after learning that the applicant had been placed on report by the prior CO for making inappropriate comments and gestures to the wife of the MK1. The reviewing officer admitted in his statement that a personality conflict existed between the reporting officer and the applicant; although he stated that the applicant was primarily responsible for the situation.
4. The evidence demonstrates that this bias by the reporting officer against the applicant continued after the change of command. It appears that the reporting officer was willing, because of her negative feelings toward the applicant, to believe negative statements made to her about the applicant without questioning the accuracy of these statements. For example, in the letter supporting the applicant's detachment for cause, she relied on a statement from a CWO, made in September 1994, that "[the applicant] had a knack for telling what he thinks you want to hear." The reporting officer also

stated in that letter that a commander had told her to "keep a close eye on the engine room" These negative but very general statements from others about the applicant fed the reporting officer's dislike of him. The reporting officer again demonstrated distrust of the applicant early on in her tenure as CO as evidenced by a statement from a LT who was the Port engineer for a Naval Engineering Support Unit. This LT stated that in the Spring of 1994, the reporting officer asked him to ensure that work on the cutter was done accurately and to handle any problems as they arose. He stated that the reporting officer became unhappy and uttered a disgruntled comment when he told her that she had a first rate engineer in the applicant. Thus, each problem in the engineering department was viewed as a major catastrophe.

5. The reporting officer's characterization of statements from the MK1 and his wife also demonstrate a bias against the applicant by the reporting officer. These statements show that, even after the wife told the reporting officer that none of the comments made to her by the applicant during the reporting period were of a sexual or harassing nature, the CO/reporting officer continued to apply pressure to the couple to have them change their statements. According to the MK1, the reporting officer told him "he should do the husband thing and talk to the applicant about their issue" and that if his wife reinstated the charges that she would "take [the applicant] to the hilt." Even though this situation was clarified by the MK1 and his wife, the reporting officer ignored this information and wrote the very negative comments about it in the applicant's OER.

6. The evidence of record also supports the applicant's contention that he became the subject of the special OER after he intervened on behalf of the crew in the "Baywatch" incident. The EMC stated that he and the crew brought the "Baywatch" incident to the applicant's attention and asked him to speak to the CO. The EMC further stated that after the applicant spoke to the CO/reporting officer she began making frequent visits to the engine room "to see what was going on." According to the EMC, the applicant was then relieved of duty. The applicant did not speak to the CO/reporting officer, but he did speak to, as he stated, the chief engineer for the Group. The chief engineer wrote in his statement that in April 1995, he became aware that both engineering and morale problems were affecting the cutter. He spoke to the applicant about them and with the applicant's consent he reported the problems to the Deputy Group Commander. The group engineer also recommended to the Deputy that the cutter undergo an engineering technical assessment. Based on the personality conflict that existed between these two individuals, it is easy to see how this last incident could have increased the reporting officer's displeasure and could have led to a biased special OER.

7. The Board finds that the special OER contains inaccurate and misleading statements. The PRRB has determined that two statements in the special OER, as originally submitted, were inaccurate. The statement -- "engineering plant rated average by MLC Technical Assessment team leader" -- was rewritten by the PRRB to read: "Engineering plant rated above average by MLC Technical Assessment team

leader." The PRRB also found the following comment to be in error and rewrote it: "Conduct has shown little improvement after previous counseling concerning inappropriate comments/gestures, documented in OER from marking period 01 January 1994 to 01 July 1994. Subject of inappropriate comments/gestures has more recently stated that unwanted behavior occurred again. Failed to keep action and behavior above question." This comment now reads as follows: "Failed to keep actions and behavior above question. During this marking period wife of subordinate stated that [the applicant] made inappropriate comments and gestures toward her."

8. The Board finds the PRRB's rewrite of the comment in block 4.c. with respect to the applicant's making inappropriate comments and gestures to the MK1's wife, to be, if not inaccurate, misleading. The comments make a factual statement that the applicant did something wrong. While the MK1's wife may have initially complained about the applicant, she recanted stating that the applicant did not say anything of a sexual or harassing nature. The MK1's wife further stated that the applicant's comments, when first made, hit her the wrong way. This is understandable, based upon their history (the applicant had previously made inappropriate comments to the MK1's wife). After a time of reflection, she realized that she had overreacted to the comments. It is unfair to the applicant that the reporting officer's inaccurate comments remain in the special OER when they have not been otherwise established, either by their nature or by some other independent means, to be in violation of the UCMJ or regulations. Moreover, the MK1's wife does not state that any inappropriate gesture was made by the applicant.

9. The statement in block 4.c. of the special OER that the applicant "does not share info with other 140' WTGB EOs or use their expertise to solve common problems" is, if not inaccurate, misleading. The supervisor wrote this comment based on what the reporting officer told him. He stated that the reporting officer gave him examples but he could not remember them at the time he wrote the statement. The applicant has provided evidence that shows that he did obtain expertise from other warrant officer engineers. The Naval Staff Engineer, a CWO2, stated that the applicant made optimum use of his services and worked closely with the Engineering Support Unit to keep his engineering plant in top shape. The LT, a Port Engineer, also stated that he worked well with the applicant. In addition, in his June 23, 1995 OER reply, the applicant stated: "I constantly share ideas and information with the east coast 140 EO's. In fact, during the period I gave another EO copies of all engineering instructions JQRs I had prepared." The supervisor's, the reporting officer's and the reviewing officer's endorsements to this OER reply did not contradict his statement about his sharing information. So the instant statement suggests, and unfairly so, that the applicant did not seek advice and assistance from others knowledgeable in the engineering field.

10. The statement in block 5.e. that the applicant's "[l]eadership practices have [led] to low morale and lack of job satisfaction in department" is a half-truth. The supervisor on the special OER wrote in his statement to the Coast Guard that morale on the cutter was extremely low when the reporting officer took command and that it

improved little from that point. The supervisor stated that the 'Baywatch' incident occurred in the midst of a morale crisis with the department heads. This suggests that low morale was pervasive throughout the ship, and not just in the engineering department, and had been that way for sometime. Moreover, the EMC also stated that morale was low aboard the cutter and that it was exacerbated by the reporting officer's actions in canceling tropical hours and prohibiting the crew from watching certain television shows. Additionally, another BMC who reported to the cutter in September 1995, after the applicant left, wrote that morale was low and the cutter's appearance needed a lot of improvement. In contrast to these descriptions of shipwide low morale, the MK1 (who had already separated from the command when he wrote his statement) indicated that the applicant demonstrated leadership and concern for his personnel in a number of ways, including: a) obtaining for all the engineers as many class C schools as possible to ensure they were trained to do their jobs; b) "arrang[ing] for a qualified engineer from GRU New York to ride the ship when [the MK1 was on leave]"; and c) making numerous phone calls to assist the MK1 in finding family services for his daughter's special needs.

11. The Board also finds the following statement, in block 9.f., to be misleading: "During casualty to ship's service generator slow to digest suggestions from various sources, present alternatives & make timely recommendations to CO." The CWO2 staff engineer who worked on the cutter's disabled service generator stated that the applicant sought expertise in all the right places and that his troubleshooting process was very logical and well thought out.

12. The entire tone of the special OER suggests that the applicant was an inept engineer. The preponderance of the evidence does not support such an evaluation. First, the chief of the group engineering division wrote that the applicant's engineering department had some problems, but rated well in numerous assessments that he made of the department. According to the Chief, during an engineering technical assessment, the engineering department was found to be in good condition and functioning appropriately. Second, a CWO Naval staff engineer wrote that the applicant knew exactly where to get assistance when there was a problem with his department. He further stated that during the two and a half years that he worked with the applicant he never knew him to be anything other than an efficient manager and capable engineer. Third, the results of the full power trials test in April 1995 revealed that the engineering department was within mandated specifications. All of this evidence suggests that the applicant was a competent engineer during the period covered by the special OER.

13. Article 10-A-1b. of the Personnel Manual requires that each "commanding officer must ensure that accurate, fair, and objective evaluations are provided to all officers under their command." In the instant case, the applicant has demonstrated that the reporting officer was prejudiced against him and that the special OER she caused to be prepared on him was written with a biased view and contained inaccurate statements and half-truths. The special OER as originally submitted did not accurately report the results of the engineering technical assessment, it did not have an accurate

account of the incident with the MK1's wife, and it wrongfully referred to matters that happened in another reporting period. The PRRB revised version of the special OER still has an inaccurate account of the incident with the MK1's wife and contains many half-truths, such as: (1) The special OER claimed that the applicant was the cause of the low morale within the engineering department, but the evidence shows that the entire ship's crew was suffering from low morale, some of it caused by the reporting officer, and that the applicant took steps to improve morale. (2) The special OER states that the applicant did not consult with the EOs of other similar cutters; but the evidence shows that he did consult with the Chief Group Engineer, the CWO2 staff support engineer, and the Port Engineer LT in solving engineering problems, and that the rating chain did not dispute his example of sharing information. (3) The special OER stated that the applicant was slow to digest suggestions from various sources with respect to the disability of the service generator, but the evidence shows that the actions taken by the applicant with respect to the repair of that generator were logical and well thought out.

14. Additionally, the Board notes that the special OER is inconsistent with the applicant's prior and previous OERs. This inconsistency alone is insufficient to cause the OER to be removed from the applicant's record. However, such an inconsistency, when coupled with evidence of error or injustice, as in this case, can be used to support the removal of the special OER.

15. The Board finds the special OER to be a biased evaluation of the applicant's performance. It contains inaccuracies in both the original and revised versions. Accordingly, it should be removed from the applicant's record.

16. The Board finds that the corrections made by the PRRB are insufficient to cure the injustice suffered by the applicant. The PRRB modified only two comments and did not adjust any corresponding marks. It stated that even with the revised comments, the marks were justified. The PRRB has provided no evidence of the weight the rating chain gave to the original comments when it assigned marks in the special OER. This Board normally removes an OER when a substantial inaccuracy has been discovered in that OER.

17. The Board concludes that the applicant's failures of selection should be removed from his record. The Board agrees with the Coast Guard's advisory opinion that a causal connection exists between the special OER and the applicant's failures of selection. The Board finds that it is not unlikely that the applicant would have been promoted with a corrected record.

18. Accordingly, the special OER and the two failures of selection should be removed from the applicant's record.

ORDER

The application of [REDACTED] for correction of his military record is granted. His record shall be corrected as follows:

- a. The special OER for the period January 1, 1995, to April 14, 1995, and all attachments shall be removed and replaced with a report for continuity purposes only.
- b. The 1995 and 1996 failures of selection for promotion to CWO3 shall be removed, and the applicant shall be given two additional opportunities before the CWO3 selection board. If he is selected for CWO3 by the first board that considers him based on a corrected record, his date of rank shall be adjusted to the date he would have received if he had been selected by the 1995 board.
- c. The applicant shall be returned to active duty with no break in service at a reasonable date and time convenient to both the applicant and the Coast Guard.
- d. The applicant shall receive back pay and allowances, subject to appropriate off-sets. This back pay shall include, but is not limited to, back pay from the date of his retirement until the date of his return to active duty and any pay that is owed to him as a result of a date of rank adjustment if he is selected by the first board to consider him based on a corrected record.

All other requests are denied.

*see dissenting opinion

[REDACTED]

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:



BCMR Docket
No. 35-97

DISSENTING OPINION

I disagree with the decision of the Majority because I believe this matter is inappropriate for summary disposition on a paper record. In order to resolve the dispute facts, this matter should be set down either for a hearing before the Board or for some other means of further fact finding, such as the appointment of a special master. See 33 C.F.R. § 52.31.

This application involves a conflict of declarations of a number of witnesses concerning specific factual instances relating to the performance evaluation of [redacted]. The Majority's decision finds bias and prejudice by the reporting officer in this performance evaluation. These are serious conclusions. They impact on the integrity of the performance appraisal process and the legal presumption of procedural regularity in the actions of the United States Coast Guard. Of equal importance, the Majority's decision affects both the reputation of [redacted] and his former commanding officer, the reporting officer. It focuses on her relations with her male subordinate.

Each party should have a fuller opportunity to challenge the evidence presented. The Coast Guard has never been given a chance to respond to the evidence presented by [redacted] in response to the Coast Guard's submissions. Without an opportunity for someone on the Board's behalf to observe the witnesses, the Board is limited in its ability to determine the witnesses' credibility.

My dissenting opinion is not intended to express an opinion on the merits of [redacted] application. [redacted] has presented substantial evidence to support his application. However, this evidence does not refute everything said in the special OER and certain of the things said by the reporting officer are corroborated by other witnesses, like her reviewing officer.

For these reasons, I believe that this matter should not be decided merely on the sworn and unsworn materials in [redacted] file application. Accordingly, I dissent from the

decision of the Majority.

