

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2008-076**

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XXXXXXXXXXXXXXXXXXXXX

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**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 on February 22, 2008, upon receipt of the applicant's completed application, 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 November 25, 2008, 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, a chief storekeeper (SKC; pay grade E-7) in the Coast Guard, asked the Board to expunge an Enlisted Employee Review (EER) he received for the period ending September 30, 2005, when he was the head of the XXXXX XXXXX Department in the XXXXXX Branch of the XXXXXX Division at the XXXXXXXXXXXXXXXX. He alleged that the EER was erroneous and unjust and has prevented his advancement to senior chief (SKCS; pay grade E-8) and appointment to chief warrant officer (CWO). He asked that his removal from the 2005 SKCS advancement list and failure to advance to SKCS or to be appointed to CWO since 2005 be reassessed by the Board.

The applicant stated that the disputed EER should be removed because (a) the performance marks are inaccurate and inconsistent with his actual performance; (b) his Supervisor at the time, CWO X, had a conflict of interest in evaluating his performance because her husband was also an SKC competing for advancement and had an adversarial relationship with the applicant; and (c) proper EER procedures were not followed. The applicant stated that he has been concerned about the disputed EER since 2005 but got no support and felt he could not challenge the EER until his Supervisor was transferred. In addition, a new Command Master Chief arrived, and his new Supervisor is supporting him in his application.

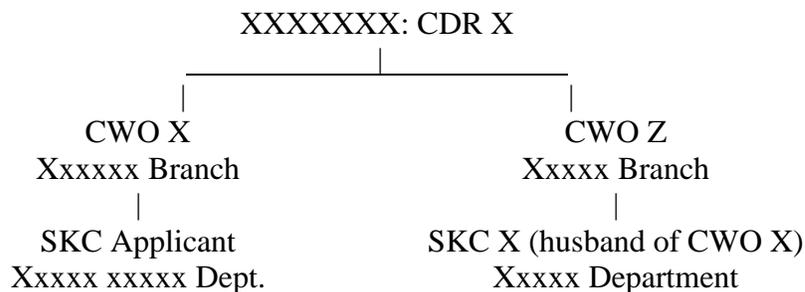
Regarding the alleged inaccuracy of the marks in the disputed EER, the applicant stated that he was unfairly evaluated by his Supervisor in 2004 and 2005. He submitted copies of his prior and subsequent EERs to show that his marks were higher in these other evaluations. The applicant stated that during his first year in the XXXXXX Branch under CWO X, he supervised the XXXXX's XXXXXXXXXXXXXXXX. However, in November 2004, he was transferred to the XXXXX

xxxxx Department because, he was told, that department needed more supervision. After receiving his first EER from this CWO X in September 2004, he “put forth improved effort in my work and sought out opportunities for growth to address comments” by his Supervisor about his lack of foresight, organization, and technical proficiency in his 2004 EER. Despite his improvements, she gave him a worse EER in September 2005 and did not recommend him for advancement. Therefore, he was removed from the SKCS advancement list and was not allowed to compete for advancement by taking the servicewide examination (SWE) in May 2006.

The applicant stated that during the evaluation period for the September 2005 EER, in addition to performing his primary duty of managing the daily operations of his department, he assumed responsibility for the following collateral duties, which required foresight, organizational skills, and technical proficiency: Leadership Development Program Coordinator, DHL Coordinator, and Building Manager of xxxxxxxx. The applicant also argued that the marks and comments by his Supervisor are belied by grades he received for classes he was taking that year in pursuit of a bachelor’s degree in business. He stated that he received an A- in “Critical Thinking”; an A- in “Critical Thinking Strategies and Decision Making”; a B+ in “Employment Law”; and a C+ in “Research and Evaluation I.” The applicant stated that he also successfully completed a class called “Introduction to Outlook Express”; Leadership Development Program Coordinator training; and training to assist with the transition to DHL. Moreover, he began the evaluation period by graduating from the Chief Petty Officer Academy, which he attended from September 18 to October 20, 2004.

The applicant also submitted a copy of the many documents he submitted to his Supervisor to prove the quality of his work prior to the September 2005 EER and argued that these documents prove that he should have received higher marks and that her evaluation was not accurate or fair. These documents included many thank you notes for both volunteer and Coast Guard projects he accomplished; many work orders showing that repairs were completed in xxxxxxxx, where he was the building manager; documentation of academic classes and training; and his own descriptions of his work accomplished under each performance category on the EER.

Regarding the alleged conflict of interest, the applicant stated that his Supervisor’s husband, SKC X, was also assigned to the Xxxxxxx’s office, which had only 23 members, although the entire unit (Xxxxx) has more than 60 members. He drew the chain of command as follows:



The applicant alleged that this arrangement violated Article 8.H. of the Personnel Manual because it raised a perception of unfairness and because his Supervisor’s husband was in a position to influence her “personnel or disciplinary actions, assignments, benefits or privileges.” The applicant was the same rate and rank (SKC) as his Supervisor’s husband, who worked in the Xxxxx Branch, and they were both competing for appointment to CWO in September 2005. The

applicant alleged that he had an increasingly adversarial relationship with his Supervisor's husband, which made the Supervisor not impartial. In support of this allegation, the applicant submitted a copy of the following email exchange between him and his Supervisor's husband:

- Applicant to SKC X at 2:19 p.m., on January 11, 2005: "Thanks for letting us know that the cleaner for the GM's was cancelled and you had to re-order it yesterday. Just kidding, can you let us know in the future when something like this happens, this way we're not racking our brains trying to find a shipment that we never signed for."
- Reply from SKC X to applicant at 7:34 a.m., on January 14, 2005: "I haven't had time to address this email until now, been out of the office Tuesday & Thursday. Playing catch up on Wednesday. I know we spoke about this, but I would like to put it in ink so that we have no misunderstandings. When I called you on Monday, I believe I told you that the GM's were not getting what they expected which was a 55 gallon drum. I stated that 2 boxes were sent and were signed for by [PO R] on the 20<sup>th</sup> of December. I also faxed you a copy of the shipping document which we had received. For you to insinuate that we had your people on a wild goose chase bothers me, not kidding. It concerns me on how eager you seemed to be in putting the ball back in xxxxxxxx court. Calling and talking to the xxxxx of Xxxxx, making a visit to the GM's and talking highly of me. This was leg work that [PO J] had already accomplished. We all now know that the reason the 55 gallon drum wasn't sent was that the unit of issue was ordered as EA instead of DR. That's what was on the GM's surf requisition sheet and I believe in FEDLOG at the time. The conversion from FLS to CMPlus has been a good thing for the Xxxxx, it's just the little bugs that need to be worked out. For instance with this order, the status for that Document # was processed for "Direct Delivery". I believe the system failed with this particular order, never heard of a xxx cancelling an order, but still send something in its place under that Document #. As a supervisor, I believe it's my job to care for my people, but it's not my job to carry them. Holding people accountable for their actions seems to work a lot better than trying to point the finger at someone else. Things get lost or misplaced all the time, just like a PR in xxxxx. [PO J] has learned a valuable lesson on how important it is to keep up with MILSTRIP orders. For what ever reason [applicant's name], I feel that you are always working against me instead of with me. I'm still miffed at the idea of you emailing me and writing that the shipment was "never signed for." The only issue from the beginning was "where's the box(s)."
- Reply from applicant to SKC X at 8:24 a.m., on January 14, 2005: "I can't understand why you think I'm always trying to work against you. We are both Chiefs, SK Chiefs to boot. Every time I send you an email regarding something, you think I'm out to get you. That is not the case, and I'm sorry that you feel that way. I feel like I have to walk on eggshells every time I say something to you. The fax that you sent me said that [SNSK R] signed for 2 packages. He actually signed for 11 packages that day and all were accounted for, that's why I called the xxx. I wanted to know what items were sent under that document number. Nobody was trying to put blame on anyone. If an item is signed for by anyone in xxx and we cannot locate it, it is our responsibility to try and find it. If someone is looking for status on an item, that's xxxxx responsibility. In this case we were told that we signed for an item that belonged to the GM's that we didn't have, so we went through the process of trying to

locate it. Life is too short to worry about piddly shit like this [SKC X]. Again, I wasn't trying to put blame on anyone just trying to locate something for the GM's.

- Reply from SKC X to applicant at 9:05 a.m., on January 14, 2005: "You're right [applicant], piddly shit that didn't deserve the first email to begin with. As for eggshells, BS."

Regarding the EER procedure, the applicant stated that he was counseled about the disputed EER on November 18, 2005, which was 48 days after the end of the evaluation period on September 30, 2005. The applicant further stated that during the evaluation period there "was no communication between myself and my supervisor ... regarding any concerns about my performance, my advancement potential, goals or acceptable standards of performance. This led me to believe that I was on the correct path and not in jeopardy of receiving marks that would affect my chance of promotion for approximately 5 years." The applicant also argued that since he was recommended for promotion on his 2004 EER and his performance improved during the subsequent evaluation period, it was unfair for the Supervisor not to recommend him for promotion on the 2005 EER.

In support of his allegations, the applicant submitted a statement from CWO Y, who has more than 29 years of experience in the Coast Guard and has been the applicant's supervisor since July 2006. CWO Y stated that the applicant "has done an exceptional job in the performance of his duties as the Supervisor of Xxxxx xxxxx (XXX) and as the Assistant Property Officer during my tenure here, directing and supervising three full time storekeepers while 'moving' over 18,000 pieces of freight in addition to managing over 12,000 line items of property valued in excess of \$20M, many times during peak, strenuous operations performing well above his pay grade. He is ready to step up to the next level in all respects, whether it is to Senior Chief or Chief Warrant Officer, particularly as a leader and subject matter expert." CWO Y praised the applicant's interpersonal skills and stated that the applicant's department was immensely effective and efficient. CWO Y stated that he was shocked to see that the applicant had received average marks on his two prior EERs and that he had not been recommended for advancement by his prior Supervisor. CWO Y said that he has learned that the applicant had a "far less than amiable relationship" with his prior Supervisor's husband, who was also an SKC in the division. He stated that he would hate to think that a Supervisor would "take a personal relationship (not their own) and turn it against their subordinate professionally speaking, but we're only human."

The applicant also submitted a statement from CWO Z, who retired in 2007 with more than 24 years of service. CWO Z stated that he was Chief of XXXXXXXXXXXX in the XXXXX Branch of the XXXXXXXX Division at the XXXXX from July 2004 until his retirement. During this time, the applicant was assigned to the XXXXXXX Branch under CWO X. CWO Z stated that he had both professional and personal relationships with CWO X and CWO Y, the applicant's two supervisors during his tenure. "[The applicant] quite often was the lead topic of conversation when communicating personally or professionally with either," but the two had very different opinions of his professional abilities. CWO X "was very negative in her perception, while [CWO Y] was highly positive with his." CWO Z stated that his own dealings with the applicant were limited but they did visit each other's departments for business purposes several times a week. In addition, they served together on the OOD selection board and were members of the chief petty officers' mess. CWO Z stated that he gained "the highest respect" for the applicant based upon these interactions. The applicant "always displayed himself a step above in his pro-

fessional courtesies, appearance and knowledge. His leadership with his junior petty officers was exceptional. ... Simply speaking, he knows how to get the all from his people.” CWO Z stated that SKC X was chief of the Xxxxx Department and the applicant’s Supervisor’s husband. SKC X and the applicant “never liked one another and often times there would be verbal exchanges that I believe had a very negative impact on his evaluations.”

### SUMMARY OF THE RECORD

On February 16, 1984, the applicant enlisted in the Coast Guard. By September 1997, he had advanced to first class petty officer, SK1, and was serving as the Assistant Xxxxx Officer in the Xxxxxxx Division at the Xxxxx. He received good marks on his EERs in this position and an Achievement Medal when he completed his tour of duty in July 2001.

From July 2001 to June 2003, the applicant was assigned to the Xxxxx Department at Group Xxxxx. The performance marks he received in 2002 and 2003 as an SK1 at Group Xxxxx appear in the table below. On his May 2003 EER, the applicant’s rating chain wrote comments describing him as an “outstanding team leaders and role model. He uses the synergistic power of team planning to maximize departmental goals. ... [He] is a self-starter requiring only initial direction. He enables his coworkers to be problem solvers and to learn from judgment and experience in resolving day-to-day issues.” The rating chain also noted that the applicant would be advanced to SKC on June 1, 2003, and that he was capable of performing at an even higher pay grade, “whether Senior Chief Petty Officer or Chief Warrant Officer.”

In November 2003, the applicant reported to the Xxxxx to serve as the head of the xxxxxxxxxxxxxx in the Xxxxxxx Branch of the Xxxxxxx Division. He served in this position until November 2004, when he was put in charge of the Xxxxx xxxxx Department. He received four annual EERs while serving in the Xxxxxxx Branch. His marks in his first two EERs as an SKC—dated September 30, 2004, and September 30, 2005—are shaded in the table below. The second of these is the disputed record in this case. CWO X served as both his Supervisor and Marking Official for these first two EERs. Her successor, CWO Y, prepared the applicant’s EERs for September 2006 and September 2007.

PERFORMANCE CATEGORY	PERFORMANCE MARKS IN EERs					
	2002	2003	2004	2005	2006	2007
Directing Others	5	5	5	4	6	6
Working with Others	6	6	5	4	6	6
Developing Subordinates	5	5	5	4	6	6
Responsibility	6	6	5	4	6	6
Evaluations	5	5	4	4→5*	5	6
Work-Life Sensitivity, Expertise	6	6	4	4	4	5
Setting an Example	7	7	5	4	7	7
Health & Well-Being	5	5	6	5	6	6
Integrity	6	6	5	4→5	6	6

Loyalty	6	6	4	4	6	6
Respecting Others	6	6	5	4→5	6	6
Human Relations	5	5	4	4	4	5
Adaptability	7	7	6	5	5	6
Judgment	NA**	NA	NA	NA	6	6
Initiative	NA	NA	NA	NA	6	6
Professional, Specialty Knowledge	6	6	5	4	6	6
Quality of Work	6	6	NA	NA	NA	NA
Professional Development	NA	NA	4	4→6	7	7
Administrative Ability	NA	NA	4	4	5	5
Organization	NA	NA	4	4	NA	NA
Monitoring Work	5	5	5	4	6	6
Using Resources	6	6	5	4	6	6
Safety & Occupational Health	4	5	4	5	6	6
Stamina	7	7	6	5	5	6
Communicating	6	6	5	4	6	6
Military Bearing	6	5	6	6	6	6
Customs & Courtesies	6	5	5	5	6	6
Conduct (S or U)	S	S	S	S	S	S
Recommendation for Advancement (R or N)	R	R	R	N	R	R

\* Four of the marks were raised by the Approving Official upon informal appeal by the applicant.

\*\*The EER form changes between pay grades and over time as performance categories may be added or dropped. "NA" means that the performance category did not appear on the EER form used to evaluate the applicant that year.

On his 2004 EER, the rating chain included the following comment:

RECOMMENDED: [The applicant] is taking steps to meet eligibility requirements for advancement to the next higher paygrade.

LEADERSHIP and POTENTIAL: [The applicant] exhibits an understanding of routine concepts and assignments, producing optimal results with direct supervision. Areas of focus to improve skill sets and leadership competencies include foresight, organization and technical proficiencies. It is anticipated that with his recent completion of the Chief Petty Officer's Academy and locally available resources, he will demonstrate a commitment to seek and display the ability to assume greater responsibilities.

On November 18, 2005, the applicant was counseled about his 2005 EER and the non-recommendation for advancement. The written comment explaining the non-recommendation for advancement states the following:

[The applicant] has not fully demonstrated the capability of satisfactorily performing the duties and responsibilities of the next level at this time. Leadership and Potential: Overall performance of required competencies is average. While [he] continues to exhibit an understanding of routine concepts and assignments, he has not demonstrated the ability to perform duties producing optimal results independently of supervision. Areas of leadership competencies still in need of improve-

ment include but are not limited to foresight, organization and technical proficiencies. In order to acquire the potential required of the next higher paygrade, it is recommended that [he] establish performance goals to include learning styles, listening and problem solving skills, time and personnel management and personal effectiveness.

The applicant did not formally appeal the disputed EER. However, on February 24, 2006, CDR X, the XXXXXXX of the XXXXX and the Approving Official on the applicant's rating chain, authorized the four corrections to the applicant's performance marks shown in the table above.

Because of the recommendation against advancement, the applicant was removed from the 2005 SKCS advancement list. He had been in the 13<sup>th</sup> spot on the list, and the cut-off for advancement was initially set at 3 and later revised to 6. Also because of the recommendation against advancement, the applicant was not allowed to take the SWE in May 2006. SKC X apparently did not take the SWE in 2005 or 2006 as his name is not on either advancement list.

On August 23, 2006, after a new supervisor, CWO Y, took over the XXXXXX Branch, CDR X changed the recommendation against advancement with the following explanation:

[The applicant] has demonstrated great strides in his performance and leadership advancement as supervisor of the XXXXX's XXXXX XXXXX Dept. His technical and supervisory skills continue to grow in strength and breadth. He has my full confidence of performing well as an E-8 storekeeper.

Although the applicant was allowed to take the SWE in May 2007, he apparently has not been advanced to SKCS or selected for appointment to CWO. Instead of remaining on active duty and competing for advancement to SKCS or for appointment to CWO, SKC X retired on May 1, 2007, and accepted a civilian job with the Coast Guard.

### **VIEWS OF THE COAST GUARD**

On July 15, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG attached to the advisory opinion a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant was counseled about the disputed EER 48 days after the evaluation period ended on September 30, 2005, although the Personnel Manual requires that such counseling occur no later than 21 days after the end date. CGPC submitted a declaration from the Approving Official for the disputed EER, CDR X, who stated that the EER was delayed because of his own deliberation of the recommendation against advancement. (This declaration is summarized below.) CGPC noted that there is no evidence that the delay in counseling disadvantaged the applicant since the period for appealing an EER does not begin until the actual date of counseling.

CGPC stated that Coast Guard policy does not preclude the assignment of an officer and her husband to the same large command as long as there is no supervisor/subordinate relationship between them. CGPC stated that the applicant's allegation that CWO X was biased against him because of her husband's adversarial relationship with him and because her husband was competing for advancement to SKCS and for appointment to CWO with him "is without merit. There is no substantiation that the assignment of CWO X and her husband to the same command/

division was improper or impacted the applicant's EER." CGPC pointed out that the applicant must have appealed his marks informally because the Approving Official corrected several marks. CGPC stated that if the applicant was still dissatisfied with his marks after the Approving Official's corrections, he should have formally appealed them.

Regarding the applicant's comparison of his performance marks in 2004 and 2005 with his marks in his prior EERs as an E-6 and his later EERs as an E-7, CGPC noted that the applicant's 2004 and 2005 EERs were his first two as an SKC/E-7 and that it is not uncommon for members' marks to drop when they are first evaluated at a new, higher pay grade because the written standards against which the members' performance is compared are different at different pay grades.

CGPC noted that the Personnel Manual does not allow an enlisted member to appeal a recommendation against advancement in an EER. CGPC stated that the fact that the applicant was not recommended for advancement from October 1, 2005, to August 23, 2006, is supported not only by the mark and comment on the disputed EER, but also by the Approving Official's memorandum changing the recommendation on August 23, 2006, and by the Approving Official's declaration. CGPC alleged that the recommendation against advancement was carefully considered and ultimately made by the Approving Official, who did not change his recommendation until August 23, 2006. Because of this change, the applicant was eligible to take the SWE in May 2007 to compete for advancement to SKCS.

CGPC recommended that no relief be granted because there "is no evidence of error or injustice in the [disputed] EER. The EER rating chain provides for additional levels of review and while the applicant claims that his supervisor was biased when conducting the evaluation, this is not supported by the record and there is no indication that the Approving Official was biased in his assignment of the not recommended for advancement marks assigned in the EER."

#### ***Declaration of CDR X, the Xxxxxxx and Approving Official for the Disputed OER***

On June 20, 2008, CDR X submitted a declaration about the applicant's BCMR application by email to CGPC. CDR X stated that as Xxxxxxx of the Xxxxx he has been the applicant's Approving Official since July 2004. CWO X, who was the applicant's first Supervisor at the Xxxxx, worked directly for CDR X, as the chief of the Xxxxxxx Branch, which included the Xxxxx xxxxx Department and the xxxxxxxxxx.

CDR X stated that he is confident that there were "several performance feedback sessions" between the applicant and CWO X during the evaluation period for his September 2005 EER as CWO X notified him whenever she counseled the applicant about his performance. CDR X stated that he "received adequate details of these conversations [from] CWO [X] indicating that specific performance feedback (good and bad) was provided." He believes that their meetings were "frequent and well communicated." However, CDR X, stated, he does not believe that they discussed whether or not the applicant would be recommended for advancement prior to the end of the evaluation period.

CDR X stated that during the evaluation period, “there were a couple of minor instances involving ‘followership’<sup>1</sup> issues between [the applicant] and his subordinates which did put some question in the mind of [CWO X] as to the effectiveness of [his] leadership.” CDR X noted, however, that during this period the applicant had to manage several subordinates who “posed significant disciplinary and performance challenges and were subsequently removed [from] the [Coast Guard].” CDR X also noted the applicant’s superior academic performance but stated that CWO X questioned his success in applying classroom principles to his workplace. CDR X stated that two particular performance lapses greatly concerned CWO X: “Both involved the failure to deliver critical flu vaccines [from] the Xxxxx’s Xxxxx xxxxx [Center] to the XXX Clinic. Due to the temperature sensitivity of the vaccines, there was only a brief window of time to deliver them to the clinic. In both instances, that time period elapsed before delivery occurred. Fortunately, subsequent tests revealed that neither batch of vaccine expired as a result. The question of sound responsibility remained.”

Regarding the applicant’s allegation that CWO X had a conflict of interest in evaluating him, CDR X stated that CWO X and her husband, SKC X, worked in different buildings and for different branches within the Xxxxxxx Division. CDR X stated that he believes the married couple “managed the arrangement professionally” around the Xxxxx, but that the content of their private discussions at home is unknown. CDR X confirmed the applicant’s claim that he and SKC X “had their differences. They did not necessarily get along, but remained professional in most instances and kept their distance.” He noted that the “possibility exists that any negative comments [SKC X] made about [the applicant] to [CWO X] outside of work could have biased [CWO X’s] assessment of [the applicant’s] performance.”

CDR X stated that any delay in the applicant’s EER counseling beyond the 21-day deadline resulted from his own need for additional time to contemplate CWO X’s recommendation that the applicant not be recommended for advancement. CDR X stated that he discussed the matter with CWO X several times, and she assured him that “ample discussion between her and [the applicant] occurred during the eval[uation] period and that articulated performance expectations which would have led to an advancement recommendation were simply not met. As a result of those discussions, [CDR X] gave the benefit of the doubt to the supervisor.”

Regarding the statements of CWO Z and CWO Y submitted on behalf of the applicant, CDR X stated that he does “not place much credence in either letter of endorsement . . . . I have experienced performance and/or disciplinary problems with both these individuals during the time they worked for me as Xxxx Div Branch Chiefs.”

CDR X concluded, however, that he would give the applicant the benefit of the doubt in this case. “In retrospect, it should have been made very clear to [him] that if he did not rise above a certain performance threshold during that eval[uation] period, he would NOT be recommended for advancement. I don’t believe that was made very clear to him during any of the counseling sessions that occurred with his supervisor, CWO X. I ask that [the applicant’s] BCMR petition be give favorable consideration.”

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<sup>1</sup> “Followership” is expected of all members, and it includes “look[ing] to leadership for guidance and feedback”; “actively seek[ing] to understand through listening, responsible questioning, and feedback”; and “work[ing] with leaders to ensure successful mission accomplishment.” See <[www.uscg.mil/leadership/spotlight/Jeopardy.ppt](http://www.uscg.mil/leadership/spotlight/Jeopardy.ppt)> and <[www.uscg.mil/hq/psc/da/competencydictionary.xls](http://www.uscg.mil/hq/psc/da/competencydictionary.xls)>.

### *The JAG's Opinion*

The JAG argued that the applicant has failed to submit evidence of error or injustice in the EER or of bias on the part of his Supervisor. The JAG alleged that the statements of CWO Y and CWO Z have been discredited by CDR X, who stated that they have had performance and disciplinary problems. In addition, the JAG noted that CDR X concurred with the Supervisor's recommendation that the applicant not be recommended for advancement. The JAG alleged that the applicant has failed to submit sufficient evidence to overcome the presumption of regularity afforded his chain of command.

The JAG stated that no policy prohibited the assignment of the applicant's Supervisor to the same division as her husband. He also alleged that the applicant has "fail[ed] to offer any evidence which would prove that such an arrangement impacted [his] EER for the marking period in question." The JAG argued that any inconsistencies between the marks in the EER and the applicant's actual performance were corrected by the Approving Official in February 2006. He argued that if the applicant was still dissatisfied with his marks, he should have formally appealed them.

The JAG stated that CDR X's declaration indicates that the applicant was not recommended for advancement in 2005 as a result of two performance lapses that reflected negatively on his responsibility. He argued that the applicant has not submitted any evidence to prove that his rating chain's actions were unjust or unwarranted.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On August 15, 2008, the applicant responded to the views of the Coast Guard. The applicant repeated the bases for his allegations of bias in the evaluation process. He noted that CDR X agreed in his declaration that it was unjust that the applicant was not advised during the evaluation period that he might not be recommended for advancement if his performance did not improve. He alleged that in their counseling sessions, the feedback he received from CWO X "was in no way significant enough to warrant such a severe measure" as not recommending him for advancement. The applicant again stated that he took many positive steps to improve his performance during the evaluation period by taking Coast Guard and college classes and by accepting challenging new collateral duties. He also alleged that his subordinates presented significant disciplinary and performance problems and that, despite his "ongoing efforts to correct their performance, there were several instances that [were] negatively reflected in [his] ... EER."

The applicant alleged that the declaration of CDR X and the statements of CWO Y and CWO Z prove his adversarial relationship with his Supervisor's husband and prove that that relationship adversely affected his EER. The applicant stated that because CWO X still works at the Xxxxx, albeit in another branch, and because of the "political atmosphere" there, "it is difficult to find individuals willing to put in writing their opinion regarding the situation. He stated that CWO Y and CWO Z were willing to submit statements on his behalf only because one of them was retiring and the other was at the end of his tour and thus due to transfer. He stated that any problems they may have had are not related to his situation and should not discredit their testimony on his behalf.

The applicant stated that his Supervisor's bias against him manifested itself in many ways. He stated that sometimes work she had already approved "suddenly was unacceptable and required significant revisions."

Regarding his failure to appeal the disputed EER formally, the applicant stated that he did not do so because the EER was handed to him just twenty minutes before he was due to catch a flight to go on vacation, because he knew that the non-recommendation for advancement could not be appealed, and because of the climate that existed within the XXXXXXXX Division.

## **APPLICABLE REGULATIONS**

### ***Enlisted Employee Reviews***

Article 10.B.1.b. of the Personnel Manual in effect in September 2005 states that "[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews. To this end, the Service has made enlisted performance criteria as objective as possible, within the scope of jobs and tasks enlisted personnel perform."

Article 10.B.2.a.1. requires the rating chain to include supporting remarks in an EER for any numerical mark of 1, 2, or 7; an unsatisfactory conduct mark; or a recommendation against advancement.

Article 10.B.2.b. states that a rating chain for an enlisted member consists of a Supervisor, Marking Official, and Approving Official. "If necessary, the Marking Official can fill the role of the Supervisor." Article 10.B.2.b.11.c. Figure 10.B.2.1. shows that at the XXXXX, a branch chief may serve as both a Supervisor and Marking Official; the division chief serves as the Approving Official; and the Superintendent is the appeal authority.

Article 10.B.5.a.1. states that members in pay grade E-7 (chief petty officers) on active duty receive regular, annual EERs at the end of each September. Article 10.B.4.a.4. states that each unit must ensure that an EER is completed, including the EER counseling sheet signed by the applicant, no more than 21 days after the end of the evaluation period. Article 10.B.5.a.3. states that "[r]egular employee reviews may not be delayed. The unit rating chain is responsible for ensuring complete reviews are acknowledged by the evaluatee and completed within CGHRMS not later than 30 days after the employee review period ending date."

Article 10.B.4.b. states that an enlisted member is ultimately responsible for "[f]inding out what is expected on the job," "obtaining sufficient feedback or counseling[,] and using that information in adjusting, as necessary, to meet or exceed the standards." Article 10.B.2.b.8. states the following regarding performance feedback during an evaluation period:

No specific form or forum is prescribed for performance feedback. Performance feedback - formal or informal - actually occurs whenever an evaluatee receives any advice or observation from a rating official on their performance or any other matter on which they may be evaluated. Performance feedback can occur during a counseling session, particularly during a mid-period session, through on-the-spot comments about performance, or at the end of the employee review period. Each evaluatee must be continuously alert for the "signals" received in one of these ways from the rating chain. If the signals are not clear, the evaluatee must ask the rating chain for clarification.

Article 10.B.4.c. states that an enlisted member is evaluated by a series of raters—the rating chain—to provide a “built-in check and accountability system to ensure supervisory personnel are aware of the importance of employee reviews and give them incentive to be totally objective and accurate.” Rating chain members are required to review and correct any inconsistencies found in an EER “when considering an individual’s performance compared to the written standard” and “[h]old the next lower supervisory level accountable for their employee reviews.” Article 10.B.4.c.2.

The Personnel Manual contains no regulations allowing the disqualification of a rating official for an enlisted member due to conflict of interest or bias although it does have such regulations for officers’ rating officials: Article 10.A.2.g.2.b. of the Personnel Manual states that a rating chain member for an officer may be disqualified as a result of “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 Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation.”

Article 10.B.4.c.3. states that the Supervisor must “clearly communicate goals and acceptable standards of performance to the evaluatee before and throughout the marking period”; “[r]oute[] the completed employee review to the Marking Official no later than nine days prior to the period ending date”; and “[c]ounsel[] the evaluatee on the employee review after the Approving Official’s action. The importance of how effective this piece of the evaluation process can be in setting the evaluatee up for future success cannot be over emphasized.”

Article 10.B.4.c.4. states that the Marking Official reviews the marks recommended by the Supervisor and discusses with the Supervisor any recommendations considered inaccurate or inconsistent with the member’s actual performance. The Marking Official may return the EER to the Supervisor for additional justification or support for any of the recommended marks. The Marking Official forwards the EER to the Approving Official no later than five days after the end of the evaluation period.

Article 10.B.4.c.5. states that the Approving Official is responsible for ensuring that there is the “[o]verall consistency between assigned marks and actual performance/behavior and output”; that the evaluatee is counseled and advised of the appeal procedures; and that the EER is submitted on time. The Approving Official must review the Marking Official’s recommended marks and discuss any recommendations considered inaccurate or inconsistent with the evaluatee’s actual performance. The Approving Official may return an EER to the Marking Official for additional justification or support for any mark. After approving the EER, the Approving Official forwards the EER to the Supervisor, who counsels the evaluatee about his marks. Article 10.B.4.c.5.f. The Approving Official must ensure that the EER is completed and entered into the Coast Guard’s database no more than 30 days after the end of the evaluation period.

Article 10.B.6.a.5. states that rating officials must mark evaluatees against the written standards on the EER form. Article 10.B.6.a.6. states that a mark of 4 “represents the expected performance level of all enlisted personnel. Normally, a single, isolated event, either positive or negative, should not drastically affect the marks assigned” on an EER. Article 10.B.6.a.7. states

that a mark of 4 is an average mark indicating that the evaluatee met “all the written performance standards for this level and none in the ‘6’ level.” A mark of 5 is above average and means that the evaluatee met “all the written performance standards in the ‘4’ level and at least one of those in the ‘6’ level.” A mark of 6 is excellent and means that the evaluatee met “all the written performance standards for this level and did not exceed any of them.”

Article 10.B.7.2. states that a recommendation for advancement means that “[t]he member is fully capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.” A mark of not recommended means that “[t]he member is not capable of satisfactorily performing the duties and responsibilities of the next higher pay grade.” Article 10.B.7.4. states that the Approving Officials’ recommendation about advancement “is final and may not be appealed. However, if the Approving Official learns new information and decides to change the recommendation, they should follow the procedures in Article 10.B.10.b.”

Article 10.B.9.a.2. states that the EER appeal process allows members to seek review of marks that they believe are disproportionately low or based on incorrect information, prejudice, or discrimination. However, a recommendation against advancement may not be appealed. Article 10.B.9.b. states that before filing an official appeal, an evaluatee should request an audience with his rating chain to discuss the EER. If not satisfied with the results of that meeting, the evaluatee “must submit the appeal within 15 calendar days ... after the date they signed the acknowledgment section of the counseling sheet for the disputed employee review. ... If appealing more than 15 calendar days ... after the date the member signed the employee review acknowledgment section, the member must explain the circumstances that did not allow or prevented him or her from submitting the appeal within the prescribed time limit.”

Article 10.B.10.b.1. states that “Approving Officials are authorized to change any mark they assigned to members still attached to the unit if the Approving Official receives additional information that applies to the particular employee review period.”

### ***Assignment of Married Members and Interpersonal Relationships***

Article 4.A.8.c. of the Personnel Manual in effect in 2005 states that “[t]he Service does not assign married couples together to the same cutter or a small shore unit of less than 60 members. If a member at such a unit marries another member assigned to the same unit, the Service will reassign one as soon as possible. Chapter 8.H. contains further guidance.”

Article 8 of the Personnel Manual is entitled “Discipline,” and Article 8.H. concerns prohibited interpersonal relationships among members. Article 8.H.2.c. states that interpersonal relationships must not jeopardize a member’s impartiality. Article 8.H.2.d. states that one factor to consider in assessing the propriety of a relationship is the “organizational relationship between the individuals: whether one member can influence another’s personnel or disciplinary actions, assignments, benefits, or privileges.” Article 8.H.2.e. states that a “relationship, including marriage, does not violate Service policy unless the relationship or the members’ conduct fails to meet the standards set by this section, standards of conduct set by the Uniform Code of Military Justice (UCMJ), or other regulations.” Article 8.H.3.a. states that “[m]embers married to members or otherwise closely related shall not be assigned in the same chain of command.” A chart at the end of Article 8.H. shows that married members may be assigned to separate units or the

same large shore unit but may not be assigned in the same chain of command or to the same afloat unit or small shore unit.

## 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 over this matter pursuant to 10 U.S.C. § 1552(a). The application was timely filed because it was submitted within three years of the applicant's discovery of the alleged error or injustice in his record, as required under 10 U.S.C. § 1552(b). The applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice.<sup>2</sup>

2. In 2005, when the applicant was serving as the chief storekeeper (SKC) in charge of the xxxxxxxx xxxxxxxx Department within the Xxxxxxx Branch of the Xxxxxxxx Division at the xxxxxxxxxxxxxxxx, he was not recommended for advancement on his annual Enlisted Employee Review (EER) and so was removed from the 2005 senior chief storekeeper (SKCS) advancement list and not allowed to take the servicewide examination (SWE) in May 2006 to compete for advancement. Although he was recommended for advancement prior to the May 2007 SWE, he has not been advanced to SKCS or selected for appointment to chief warrant officer (CWO). The applicant asked the Board to expunge his EER dated September 30, 2005, and to reassess his failure either to advance to SKCS from the 2005 advancement list or to be selected for appointment to CWO. He based this request on alleged errors in the EER and on alleged bias on the part of his Supervisor due to her marriage to another SKC in the Xxxxxxxx Division with whom the applicant had an adversarial and professionally competitive relationship (see the diagram on page 2 above).

3. The Board begins its analysis in every case by presuming that the disputed information in the applicant's military record is correct, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.<sup>3</sup> Absent

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<sup>2</sup> The Board notes that the applicant did not take advantage of the opportunity to appeal his EER marks or seek relief from the Personnel Records Review Board (PRRB). However, those avenues of administrative remedy have expired, and the crux of the applicant's complaint—the recommendation against advancement in 2005—was not subject to appeal under Article 10.A.9. of the Personnel Manual. The Board's policy is that exhaustion of administrative remedies has occurred in situations where a remedy existed but is no longer available or practical. This policy is consistent with its rule at 33 C.F.R. § 52.13(b) and with congressional intent. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (holding that “[o]f ‘paramount importance’ to any exhaustion inquiry is congressional intent”) (citing *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). The only limitation Congress placed on filing an application with the BCMR is the three-year statute of limitations under 10 U.S.C. § 1552(b), and it even allowed that to be waived in the interest of justice. A blanket denial of applications in the absence of an appeal or application to the PRRB, would be a violation of the Board's responsibility under 10 U.S.C. § 1552.

<sup>3</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

evidence to the contrary, the Board presumes that the applicant's rating officials have carried out their duties "correctly, lawfully, and in good faith."<sup>4</sup>

4. Under Article 10.B.1.b. of the Personnel Manual, "[e]ach commanding officer/officer in charge must ensure all enlisted members under their command receive accurate, fair, objective, and timely employee reviews." The applicant alleged that his 2005 EER was not prepared accurately, fairly, or objectively and should be expunged from his record (a) because he was counseled about it by CWO X, who served as both the Supervisor and Marking Official for the EER, more than 21 days after the end of the evaluation period on September 30, 2005, in violation of Article 10.B.4.a.4. of the Personnel Manual; (b) because the performance marks in the EER are inaccurate and inconsistent with his actual performance; and (c) because CWO X was biased against him because he had an adversarial relationship with her husband, who was also assigned to their division, and because CWO X had a conflict of interest in evaluating his performance because her husband was, like the applicant, an SKC competing for advancement to SKCS and for appointment to CWO. The applicant argued that it was unfair and improper that his Supervisor/Marking Official was married to another member of his small division of 23 employees and to someone with whom he was competing for advancement because she could not evaluate him impartially under the circumstances. He also alleged that, although CWO X counseled him about his performance during the evaluation period, she failed to warn him that he might not be recommended for advancement.

5. Regarding the alleged lateness of the EER counseling, the date of the signatures on the EER counseling sheet supports the applicant's allegation that CWO X counseled him about it on November 18, 2005, which was not within 21 days of the end of the evaluation period on September 30, 2005, as required by Article 10.B.4.a.4. of the Personnel Manual. His Approving Official, CDR X, stated in his declaration for CGPC that he believes the EER counseling was delayed because he himself took extra time to decide whether or not to recommend the applicant for advancement. However, as the Board held in another case, BCMR Docket No. 2004-041, "lateness, *per se*, is insufficient to justify removal of an otherwise valid EER, especially when that lateness has caused no harm to the member." As an EER has already been approved by the Approving Official when EER counseling occurs,<sup>5</sup> a delay of EER counseling cannot have any impact on the EER itself unless it affects the member's opportunity to appeal the EER marks. The applicant stated that he did not appeal the disputed EER in part because he was counseled about it the same day that he was flying out of town on leave, which would not have been the case had he been timely counseled by October 21, 2005. Under Article 10.B.9.b. of the Personnel Manual, members are supposed to appeal their EERs within 15 days of the date of counseling. However, Article 10.B.9.b. also allows for exceptions to this 15-day deadline. The applicant has not alleged or shown that he ever attempted to appeal his EER and had his appeal denied for untimeliness. In fact, the record shows that he at least informally appealed his marks to his Approving Official after his return from leave because CDR X corrected four of his performance marks on February 24, 2006. Therefore, the Board is not persuaded that the violation of Article 10.B.4.a.4. had any negative effect on the EER or caused the applicant any harm. Since the

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<sup>4</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>5</sup> Personnel Manual, Article 10.B.4.c.5.f.

applicant has not shown that his record was prejudiced by the lateness of the EER counseling, his rating chain's violation of Article 10.B.4.a.4. must be deemed harmless error.<sup>6</sup>

6. The applicant alleged that CWO X and SKC X should not have been assigned to the Xxxxxxx Division because they were married and that this arrangement created bias in CWO X's preparation of the disputed EER. Although the applicant argued that the arrangement was improper under Article 8.H., that part of the Personnel Manual essentially concerns disciplining members who are in the same chain of command or are assigned to the same small unit and who have unacceptable relationships with each other; it is not about whether married members assigned to the same unit may serve as rating officials for other members and employees in the unit. Because the Xxxxx is a unit of more than 60 members and CWO X was not a member of SKC X's chain of command, the Coast Guard did not violate either Article 4.A.8.c. or Article 8.H.3.a. of the Personnel Manual in assigning CWO X and SKC X to two different branches of the Xxxxxxx Division at the Xxxxx. The applicant noted that Article 8.H.1.c. states that "[i]nterpersonal relationships which raise even a perception of unfairness undermine good leadership and military discipline." However, the applicant's *perception* of unfairness is not likely to have caused CWO X to be biased against him.

7. Under Article 10.B.1.b. of the Personnel Manual, the applicant was entitled to an accurate, fair, and objectively prepared EER. The applicant alleged that CWO X did not rate him impartially because of a conflict of interest: She was married to another SKC against whom the applicant competed for advancement to SKCS and for appointment to CWO. This argument would logically prevent any married member of the Coast Guard from serving on the rating chain of someone of the same rank or rate as his or her spouse. Of course, the competition for advancement and appointment among the higher enlisted rates is very tough<sup>7</sup> because of the pyramidal structure of the Service. However, the applicant has not alleged or proved that his removal from the advancement list caused SKC X to be advanced to SKCS or appointed to CWO. In fact, SKC X apparently did not even compete for advancement by taking the SWE in 2005 and 2006 because his name is not on either advancement list. Instead, on May 1, 2007, SKC X retired to a civilian position at the Xxxxx, which he could not have done had he accepted an advancement or appointment.<sup>8</sup> Nor is the Board persuaded, based on the record, that CWO X lacked sufficient integrity to stop herself from slightly improving her husband's chance of advancement or appointment by downgrading the applicant and not recommending him for advancement. As stated in Finding 3 above, absent evidence to the contrary, the Board must presume that she evaluated the applicant "correctly, lawfully, and in good faith."<sup>9</sup> In this regard, the Board also notes that all officers are evaluated on the accuracy of their evaluations of subordinates, and so CWO X was accountable in her own performance evaluations for the accuracy of her evaluation of the applicant.

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<sup>6</sup> *Engels v. United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (finding that an error is harmless unless it is "causally linked with" the record the officer wants corrected).

<sup>7</sup> Upon inquiry, the Coast Guard advised the Board that 9 advancements to SKCS were made in 2005; 5 in 2006; and 4 in 2007 with one carried over to 2008.

<sup>8</sup> Article 12.C.9.a. of the Personnel Manual states that a CWO must have completed two years in grade to request retirement. Article 12.C.11.a.2.b.(4) states that a senior chief petty officer must also have completed at least two years in grade to request advancement.

<sup>9</sup> *Arens*, 969 F.2d at 1037.

8. The applicant alleged that CWO X did not prepare his 2005 EER fairly and impartially because he had an adversarial relationship with her husband, SKC X. The Board finds that the applicant has proved that he and SKC X did not like each other. CWO Z stated that the applicant and SKC X “never liked one another and often times there would be verbal exchanges.” The applicant’s Approving Official, CDR X, stated that the applicant and SKC X “had their differences,” did not always “get along,” and “kept their distance.”<sup>10</sup> The tone and content of the emails the applicant submitted also indicate their dislike of each other. As chiefs of the Xxxxx xxxxx and Supply Departments, the applicant and SKC X apparently interacted frequently and had occasion to blame each other for certain supply and delivery problems.

9. The question before the Board, however, is not whether SKC X disliked the applicant but whether his wife, CWO X, was not impartial in evaluating the applicant because of her husband’s dislike of the applicant. Of course, even if SKC X had not been married to the applicant’s Supervisor, he might have informed her of his apparently low opinion of some of the applicant’s work, and she could legitimately have taken any of his complaints about the applicant into account. In theory, it is also possible that SKC X made false complaints about the applicant’s performance to her and that her marriage to SKC X led her to place undue credence in his reports, but there is insufficient evidence in the record to find that SKC X made false reports about the applicant to CWO X. Did CWO X downgrade the applicant and make a recommendation against his advancement simply because her husband disliked him? CWO Z stated that he believes that the unfriendly relationship between the applicant and SKC X “had a very negative impact on his evaluations.” CWO Y stated that he did not like to think that CWO X would downgrade the applicant based on her husband’s dislike of him “but we’re only human.” The applicant’s Approving Official, CDR X, acknowledged that the “possibility exists that any negative comments [SKC X] made about [the applicant] to [CWO X] outside of work could have biased [CWO X’s] assessment of [the applicant’s] performance,” but he recommended that the Board grant relief on an entirely different basis. CDR X also opined that he did “not place much credence” in the statements of CWO Y and CWO Z because he has had “performance and/or disciplinary problems” with both of them. Therefore, of the three officers’ statements in the record, one claims that he believes SKC X’s dislike of the applicant did negatively affect CWO X’s evaluation of him, and two acknowledge the possibility of such an effect because of the marriage but do not actually endorse it.

10. The applicant alleged that CWO X’s lack of impartiality is proved by inaccuracies in the disputed EER. As evidence of the alleged inaccuracies, he pointed to the marks in his prior and subsequent EERs; his academic grades; his own EER input; completed work orders; notes of appreciation he received; his collateral duties and other training during the period; his poorly performing subordinates; the opinion of his subsequent Supervisor/Marking Official, CWO Y; the opinion of another officer in the Xxxxxxx Division, CWO Z; and the Approving Official’s decision to correct four of the marks in the EER and recent support for his request to remove the EER. With regard to this evidence, the Board finds the following:

a. The applicant’s high marks in his 2002 and 2003 EERs are not evidence of error in his 2005 EER. The applicant was still an SK1 in 2002 and 2003 and was thus evaluated

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<sup>10</sup> The Board notes that the applicant’s next Supervisor, CWO Y, stated that he had learned that the applicant had a “far less than amiable relationship” with SKC X, but he did not state how he learned this or that he witnessed it, and may well have heard it from the applicant himself.

on the EER form for a petty officer (CG-3788B). The written performance standards on this form are significantly less stringent than those on the EER form for chief, senior chief, and master chief petty officers (CG-3788C).

b. The applicant received higher marks in most performance categories on his first SKC EER in September 2004 than he did in September 2005 and significantly higher marks in 2006 and 2007. He alleged that his performance improved during the 2005 evaluation period, so his marks should have improved from 2004. He also pointed to his academic grades and his poorly performing subordinates as evidence that he should have received higher marks in 2005. The record shows that in November 2004, the applicant was transferred from the xxxxxx to the Xxxxx xxxxx Department because the latter needed more supervision. It appears that his leadership skills were taxed more heavily in the 2005 evaluation period because CDR X remembers that several of the applicant's subordinates "posed significant disciplinary and performance challenges." Therefore, the applicant's duties during the two evaluation periods were substantially different. Almost four years after the end of the evaluation period, CDR X still remembers some significant errors in the Xxxxx xxxxx Department during the applicant's tenure and remembers the fact that the Supervisor had to provide "several performance feedback sessions." Although CDR X was aware of the applicant's academic grades and his subordinates' poor performance, CDR X did not state that he believes that the marks in the disputed EER were inaccurate. Therefore, the Board cannot conclude that the higher marks that the applicant received in 2004 prove that the disputed EER is erroneous. Nor does the fact that the applicant's performance was rated much higher in 2006 and 2007 by CWO Y persuade the Board that CWO X and CDR X were wrong in their assessment of his performance during his first year as chief of the Xxxxx xxxxx Department.

c. The applicant's EER input, notes of appreciation, and completed work orders show that he completed a significant amount of work during the evaluation period. They do not prove that his overall performance in the various performance categories necessarily exceeded the written standards for the marks he was assigned.

d. CWO Y and CWO Z clearly have a highly favorable opinion of the applicant. Neither, however, was in the applicant's chain of command during the 2005 evaluation period. Their assessment of his abilities does not persuade the Board that CWO X and CDR X erred in assessing his actual performance during that period.

e. On February 24, 2006, the Approving Official, CDR X, raised four of the marks on the disputed EER after having approved them in November 2005. This is the strongest evidence in the record that CWO X's recommended marks were too low. On the other hand, it also shows that CDR X has carefully reviewed the applicant's claims and submissions, scrutinized the marks, and made the corrections he found to be justified. The Board is not persuaded that the entire EER must be infected with bias simply because CDR X found four of the marks recommended by CWO X to be too low.

11. The applicant argued that his non-recommendation for advancement in 2005 was unfair because he was not expressly warned that it was a possibility during the evaluation period. CDR X recommended that the Board grant relief on this basis because he does not believe that CWO X warned the applicant that he was at risk of losing his place on the advancement list. However, there is no regulation requiring that a member be warned that he is in danger of losing

his command's recommendation for advancement. Moreover, on his 2004 EER, although the applicant was recommended for advancement, he also received the following written comment about that recommendation: "[The applicant] is taking steps to meet eligibility requirements for advancement to the next higher paygrade." And the written comments concerning his leadership and potential in the 2004 EER are likewise highly tentative in their endorsement: "[He] exhibits an understanding of routine concepts and assignments, producing optimal results with direct supervision. Areas of focus to improve skill sets and leadership competencies include foresight, organization and technical proficiencies. It is anticipated that with his recent completion of the Chief Petty Officer's Academy and locally available resources, he will demonstrate a commitment to seek and display the ability to assume greater responsibilities." Given these comments and the fact that the applicant was counseled about his performance several times during the evaluation period, the Board finds that the applicant has not proved that the recommendation against advancement was an unfair surprise.

12. The Board finds that the applicant has failed to prove by a preponderance of the evidence that his rating officials failed to act "correctly, lawfully, and in good faith"<sup>11</sup> in preparing his 2005 EER. He has not proved that the disputed EER and the recommendation against advancement therein are erroneous or unjust or are the product of a conflict of interest or bias on the part of his Supervisor/Marking Official, CWO X. Therefore, there are no grounds for reassessing the applicant's failure to advance or to be selected for appointment to CWO. The Board also notes that the applicant's request regarding advancement is very vague. He neither alleged nor proved that he would have advanced to SKCS had he not been removed from the advancement list in 2005.

13. Accordingly, the applicant's request should be denied.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

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<sup>11</sup> *Arens*, 969 F.2d at 1037; *Sanders*, 594 F.2d at 813.

**ORDER**

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

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Donna M. Bivona

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Robert F. Parker

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Eric J. Young