

N.B.: The delegate of the Secretary concurred in the relief recommended by the Board in this case on March 22, 2000.

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-073

FINAL DECISION

ANDREWS, Attorney-Advisor:

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was commenced on April 21, 1998, upon the BCMR's receipt of the applicant's request for correction.

This final decision, dated September 9, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST FOR RELIEF

The applicant, a xxxxxxxxxxxx serving on an active duty contract in the Coast Guard Reserve, asked the Board to correct his record by removing two officer evaluations reports (OERs) issued prior to his discharge from the regular Coast Guard. The disputed OERs were issued for the periods August 17, 199x, to March 31, 199x (OER1), and April 1, 199x, to September 30, 199x (OER2). The applicant asked that the disputed OERs be replaced by OERs marked "For Continuity Purposes Only." During the time covered by these disputed OERs, the applicant was a student engineer aboard the Coast Guard cutter xxxx.

The applicant also asked the Board to remove his failures of selection to lieutenant. He asked that, if he is selected for promotion by the next selection board, his date of rank be back-dated to what it would have been had he been selected for promotion by the selection board that met in 199x. He asked to be awarded all back-pay and allowances should this occur.

The applicant anticipated that he might be released from active duty by the time the Board makes its decision. If this is the case, he wants to be offered an opportunity to return to active duty and to have his record corrected to show that he never left active duty. Under such circumstances, he asked to be awarded all back-pay and allowances, including leave, that he would have received had he never left active duty. The applicant specified that, should the awarded accrued leave exceed 60 days, he would like to have the option of immediately taking the leave that exceeds 60 days prior to the end of the fiscal year or selling the leave that exceeds 60 days back to the Coast Guard "without prejudice to his total career entitlement to otherwise 'sell back' leave days." In addition, should he be returned to active duty as a result of this decision, the applicant asked that his consideration by a selection board be delayed until two additional regular scheduled OERs are included in his record.

APPLICANT'S ALLEGATIONS

The applicant alleged that he received two negative and inaccurate OERs as a student engineer because his supervisor, the Engineer Officer on the cutter *xxxx*, incorrectly administered his qualification process for the Student Engineering Program (SEP). When the applicant began serving on the *xxxx*, the SEP Instruction (COMDT-INST M3502.11) had recently been revised. The new standards had not yet been tested to determine whether the goals were attainable given cutters' unpredictable schedules. The applicant alleged that his supervisor ignored many of the new policies and wrongly assigned him certain time-consuming duties on the *xxxx* in violation of SEP rules. Between his supervisor's incorrect demands, the *xxxx*'s schedule, and the extra duties he was wrongly assigned, it was "physically impossible for him to accomplish what the Supervisor erroneously expected." As a result, he received poor OERs and failed of selection twice in 199x and 199x.

Allegations Regarding the First Reporting Period Aboard the xxx

The applicant argued that his supervisor ignored Paragraph 3.b. of the SEP Instruction, which allows students to complete Parts A and B of the qualification process in non-serial order if a cutter's schedule makes completing Part A (which requires underway time) before Part B (which is mostly administrative) impracticable. The applicant alleged that his supervisor told him, in violation of policy, that he could not begin Part B until Part A was completed.

The applicant alleged that his supervisor should have applied Paragraph 3.b. of the SEP Instruction because the *xxxx*'s schedule made it impossible for him to complete Part A and Part B in consecutive order within the time recommended by the SEP Instruction. He explained that the *xxxx* remained in port for the first four and one-half months of his tour of duty. Most of the requirements of Part A involve watch qualification and cannot be completed without underway time. Therefore, he alleged,

he was not permitted to make progress on his SEP qualification during his first four months on board, which was more than 20 percent of his total time aboard the *xxxx*.

The applicant also alleged that, before he reported to the *xxxx* on August 27, 199x, he had orders to attend Damage Control Assistant School (off the boat) as of September 2, 199x. Attending the school is one of the requirements of Part A. However, the captain canceled his orders to attend the school the same day he reported aboard.

The captain also immediately ordered him "to assume the duties of the vessel's Engineering Administrative Assistant (EAA)." Apparently, the *xxxx's* engineering administrative records were not in compliance with Coast Guard standards and had to be readied in time for the cutter's scheduled deployment in January 199x. As the EAA, the applicant "inspected, accounted for, updated, reproduced and/or replaced over 4000 drawings, more than 100 technical manuals, all required historical records, and all publications needed to pass . . . inspection." As a result of the applicant's work, the *xxxx* passed the inspection of its engineering administrative records.

The applicant alleged that his work with the records could have counted toward his fulfillment of the requirements of Part B of the SEP, but his supervisor "consistently refused to treat any of the work as related to Part 'B' until Part 'A' was completed. That refusal was in violation of the [SEP Instruction], which specifically provides for flexibility in completing SEP qualifications based on a cutter's schedule." Because his supervisor refused to count his EAA work toward his fulfillment of the Part B requirements, his supervisor assigned him low marks and wrote negative comments in his OER concerning his progress toward qualification.

The applicant further stated that, in addition to EAA, he was ordered to perform the collateral duty of Damage Control Personnel Qualification Standard (DCPQS) officer. This extra duty, he alleged, violated Paragraph 2.c. of the SEP Instruction. However, he qualified quickly for the extra duty so that he could train the crew in damage control before the cutter got underway in January 199x. The captain gave the applicant a letter of commendation for this service. The applicant stated that he also qualified as a Damage Control Locker Leader and Team Leader (one of the Part A requirements) "well within the prescribed time frame."

Despite this extra work, however, the applicant was assigned low marks in OER1 for the categories "Being Prepared," "Using Resources," "Getting Results," and "Responsiveness." He alleged that these low marks stand "in contradiction of the sum of the comments" in the corresponding comment block.

The applicant alleged that, once the *xxxx* got underway, his progress toward qualification was further impeded by his placement on port and starboard (P/S) duty. P/S duty requires an officer to alternate six hours on duty and six hours off duty twice each day. "Over a period of days, it becomes a grueling ordeal and detracts from the officer's performance." The applicant alleged that, when he questioned his assignment

to continuous P/S duty, his supervisor threatened him with removal from the SEP and told him "the P/S duty was an 'incentive' to accelerate the qualification process." "By using P/S duty to make the SEP completion more difficult, the [supervisor] was in violation of Section 5.a.(3)(a).3. of the new instruction."

Another obstacle to his completion of the Part A requirements during the reporting period for OER1, the applicant alleged, was the delay in his appearance before the Auxiliary Watch qualification board. The applicant stated that he completed the requirements for this board on March 9, 199x, prior to the end of the rating period for OER1 on March 31, 199x. However, his supervisor "delayed his appearance before the Auxiliary Watch qualification board until April 11, 199x."

The applicant alleged that ultimately, "approximately 70% of the rating period for [OER1] was spent in port." Therefore, "he was prevented from completing even half of the watch qualifications imposed as a prerequisite for [the supervisor] to review his Part 'A' work."

Allegations Regarding the Second Reporting Period Aboard the xxxx

The applicant alleged that he was finally allowed to attend Damage Control School for 47 days in May and June 199x. The applicant argued that this timing caused him to miss underway time, whereas, had he attended the school as originally scheduled, in September and October 199x, he would not have missed any underway time.

Furthermore, the applicant alleged that when he had reported aboard the xxxx, his supervisor had told him he would not have to provide written answers to Part A because "all research called for in Part 'A' would be covered in the watch qualification process." However, when he finally finished the watch qualification process, the supervisor changed his mind and required written answers. Therefore, the applicant's completion of Part A was further delayed, through no fault of his own, because the applicant could have prepared the written answers to Part A much sooner, had he known they would be required.

The applicant also alleged that his supervisor failed to counsel him monthly, as required by the SEP Instruction, after April 199x. He submitted a copy of his "Student Engineer Monthly Meeting Check-Off Sheet," which bears no signatures after April 199x. Instead, his supervisor informally indicated to him "on only a few occasions, that he had some concern that [the applicant] was moving through the program too slowly." The applicant alleged that he increased his production after each such advisement.

As a result of these obstacles and delays, the applicant alleged, he "was not allowed to present any Part 'A' qualification sections for [the supervisor's] signature until October 22, 199x. No Part 'B' qualification sections were able to be presented for [the supervisor's] signature until late December 199x and early January 199x." The applicant alleged that he completed the SEP in April 199x, after only 5 months of total underway time and just 15 months after the xxxx first got underway. The applicant alleged that the SEP manual recommends the SEP course be completed within 14 months, but that his supervisor's actions made this impossible.

Allegations Regarding the Disputed OERs

The applicant alleged that, in contrast to the low marks in the disputed OERs, the actual quality of his work is documented in his qualification letters and in some of the comments in the OERs, which show that he performed good work. He alleged that his rating chain ignored the fact that in his progress under SEP, he "was ahead of most Student Engineers on WHEC's (including the other Student Engineer on CGC xxxx)." He alleged that his supervisor told him that the low marks and comments in the disputed OERs were intended "as incentives for him to perform in accordance with the expectations set by the Supervisor." Because such a purpose is impermissible under the Personnel Manual, and because the supervisor's "performance expectations were not in

conformance with the Coast Guard's official standards in effect at the time," the disputed OERs are unjust and should be removed.

With respect to OER1, the applicant alleged that the comments support higher marks than those actually assigned and that no examples are cited to support the mark of 3¹ in block 3.d., Responsiveness, as required by the Personnel Manual. The applicant alleged that the mark of N/O, meaning "not observed," in the category Warfare Expertise is inaccurate. He cited his duties as Damage Control Assistant, Lead Locker Leader, and Damage Control Trainer and his completion of Damage Control Assistant School, Advanced Shipboard Firefighting School, and "several Team Trainers for shipboard damage control" as evidence that his supervisor had ample basis on which to judge his performance in this category but ignored it in violation of Article 10-A-4.d.(4)(d) and (f).

The applicant alleged that OER1 is also inaccurate because the reporting officer erred by stating in block 10.d. that he rarely dealt with the public. As evidence, the applicant pointed out that block 4.c. documents his volunteer work at a local elementary school and his receipt of the Humanitarian Service Medal for volunteer work during an October 199x fire.

With respect to OER2, the applicant alleged that it omitted his accomplishments as Auxiliary Division Officer. This duty, he stated, put him in charge of "[a]ll water, fuel, compressed air, steam, heating, A/C, sewage, and other crew comfort equipment and issues." The applicant also alleged that the comments in OER2 that he "[h]ad difficulty meeting deadlines," "often had to be prompted to increase productivity and output," and "[r]arely kept [the] chain of command informed about casualties and/or repairs" are false. He stated that all work, part, and repair requests and casualty reports had to be signed by his supervisor, and so no engineering work could be done without his supervisor knowing. The applicant alleged that the supervisor provided no examples to justify these comments.

The applicant also alleged that the marks of 3 he received in blocks 3.c. (Getting Results), 3.d. (Responsiveness), and 9.a. (Initiative) of OER2 are not supported in the comments, as required by the Personnel Manual.

The applicant further stated that a new Executive Officer reported aboard the *xxxx* just two months before the end of the second reporting period. However, the applicant alleged, the previous Executive Officer, as the applicant's reporting officer, did not prepare a written evaluation of the applicant as required by the Personnel Manual. In addition, the new Executive Officer, instead of marking N/O in blocks 9.f. and 11 as required by the Personnel Manual when the period of observation is limited, simply reiterated the supervisor's comments.

¹ Officers are evaluated on a scale of 1 to 7, with 7 being the best mark.

As further evidence of the reporting officer's errors, the applicant alleged that, whereas the reporting officer commented in block 10.d. that he had "[a]bly represented the Coast Guard . . . during the xxxxx," the applicant was not there; at the time, he was at damage control school. Another error in OER2 is that block 9.f. indicates he arrived aboard the xxxx at least two months earlier than was actually true.

The applicant also alleged that at the end of each rating period, he prepared Officer Support Forms for his supervisor. However, his supervisor told him they were unnecessary, threw them away, and failed to use them as a counseling tool in accordance with the Personnel Manual. After receiving each of the disputed OERs, the applicant alleged, he approached his supervisor for counseling but was rejected. His supervisor merely told him that "he could 'recover' from those OERs."

In addition, the applicant alleged that his reporting officer, the Executive Officer of the xxxx, did not require the supervisor to use the Officer Support Forms, as required by Article 10-A-2.e.(2)(d) of the Personnel Manual. The reporting officer also failed to "ensure that the SEP was properly administered to produce accurate evaluations of [the applicant's] performance and progress in completing it."

The applicant argued that, because OER1 and OER2 are full of inaccuracies, omissions, and unsupported low marks, they are unjust and should be removed from the record. Furthermore, because the disputed OERs were in his record before the 1995 and 1996 selection boards, his failures of selection should be removed so that he will have additional chances to be promoted. The applicant further alleged that the evaluation system was unfairly conducted as a whole on the xxxx. As evidence he pointed out that nine other xxxxxx who served on the xxxx from July 199x to July 199x have been passed over for selection twice and retired involuntarily. He also alleged that 21 out of the 28 (75 percent) officers who served on the xxxx during those three years have been involuntarily separated from the Coast Guard.

Finally, the applicant alleged that his performance in his current billet, the only billet he has filled since his tour of duty on the xxxx, shows that the OERs he received as a student were erroneous. As evidence, he pointed out that he has not received a mark of 3 since he left the xxxx, and his marks in recent OERs have averaged above 4.4. The applicant further alleged that he is now filling an O-4 billet even though he is only an O-2 and that the OERs he has received for this work show that he is "a good performer and a quick learner."

RELEVANT REGULATIONS

Student Engineering Program (SEP)

COMDTINST M3502.11 contains the rules for the administration of the SEP and the requirements that constitute "the minimum standard for certification to engineering duty afloat." It was issued on August 8, 1991.

Paragraph 3 of the instruction states as follows:

b. . . . Officers assigned to this program shall complete Parts "A" and "B" per this instruction. Cutter deployments and/or lengthy maintenance availabilities may make completing Parts "A" and "B" in order difficult; however, initial emphasis shall be placed on Part "A" with adjustments as necessary to fit the cutter's schedule and the student's progress. OOD qualification may be obtained any time during the training period, but the officer's Student Engineering Program shall not be deemed fully complete until this requirement is met. . . .

c. Assignment as Student Engineer is their primary duty. They shall not be assigned any major collateral duty, such as Training Officer, Exchange Officer, Morale Officer, etc., except in cases of emergency. Additionally, they shall not be assigned any major collateral duty until after the six month period associated with completion of Part "A" to ensure a maximum benefit is derived from this portion of instruction. During the period associated with Part "B", collateral duty assignments of a nonengineering nature, if made, shall be held to a bare minimum.

According to Paragraph 5.a.(2)(a), "[t]he emphasis during Part "A" [Cutter Engineering Indoctrination] is upon learning practical shipboard engineering fundamentals Administrative work or large reading assignments not directly concerned with equipment operation and/or maintenance should not be allowed to interfere with the required PQS."

According to Paragraph 5.a.(2)(b), Part A should be completed in approximately six months, but "taskings listed in this manual may be varied at the discretion of the Engineer Officer."

Paragraph 5.a.(2)(c) requires students to maintain a notebook with written answers to the questions posed in the SEP Instruction, "a copy of Damage Control PQS annotated with correct answers, shipboard watch qualification check-off sheets, and all engineering system drawings required for the various levels of watch qualification."

Paragraph 5.a.(3)(a).3. states that student engineers "shall ... [s]tand engineering watches (4 hours on and 12 hours off) at sea"

Paragraph 5.a.(3)(b) requires the Engineer Officer to "develop, instruct and provide frequent feedback to the student engineer regarding progress It cannot be stressed enough that the success of this program hinges on the Engineer Officer's involvement." It also requires the Engineer Officer to conduct monthly counseling ses-

sions to review the student's notebook and progress. The commanding officer is also advised to review the student's notebook on a quarterly basis.

Paragraph 5.b.(2)(a) states that "[o]fficers who complete Part 'A' and who are deemed otherwise qualified will be permitted to continue with Part 'B'." Paragraph 5.b.(2)(b) states that "[t]he emphasis during Part 'B' is on the administrative aspects, but will also include, through watchstanding, practical application of the fundamentals learned during Part 'A'." Paragraph 5.b.(2)(c) recommends that Part "B" be finished within eight months, but permits the "sequence of the taskings listed in this manual [to] be varied at the discretion of the Commanding Officer per recommendations of the Engineer Officer."

Paragraph 5.b.(3) requires students, while completing Part B, to "[c]ontinue standing engineering watches until qualified as an underway EOW. Upon attaining this level of qualification, the Student Engineer may enter the normal engineering watch rotation as dictated by the needs of the command."

Preparing an OER

Article 10-A-4 of the Coast Guard Personnel Manual (COMDTINST M1000.6A) describes how members of a rating chain should prepare an OER. Section 10-A-4d.(7) states the following:

(b) For each evaluation area, the Reporting Officer shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each of the performance dimensions, the Reporting Officer shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards. . . . After determining which block best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form in ink.

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(d) In the "Comments" sections following each evaluation area, the Reporting Officer shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a "4." The Reporting Officer shall draw on his/her own observations, from information provided by the Supervisor, and from other information accumulated during the reporting period.

(e) Comments should amplify and be consistent with the numerical evaluations in the evaluation area. They should identify specific strengths and weaknesses in performance or qualities. Well-written comments must be sufficiently specific to paint a picture of the officer's performance and

qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area.

...

Article 10-A-2(d)(3) of the Personnel Manual states that use of Officer Support Forms (OSFs) is mandatory for all evaluations of ensigns and lieutenants junior grade. Article 10-A-2(d)(2) provides that supervisors shall use the OSFs to counsel and evaluate the reported-on officers.

Replies to OERs

Article 10-A-4h. allows the Reported-on Officer to reply to any OER and have the reply filed with the OER if they are submitted within 14 days of receipt of the OER copy from the commandant. The provision for reply is intended to "provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official."

SUMMARY OF THE RECORD

The applicant graduated from the Coast Guard Academy and was commissioned an ensign in May 199x. On August 27, 199x, he reported aboard the xxxx as an engineering student.

A memorandum dated August 29, 199x, indicates that the applicant was assigned as the xxxx's Engineering Administrative Assistant upon his arrival on the cutter and that the cutter was then missing many technical publications.

On January 22, 199x, the applicant qualified as a security watchstander. On February 10, 199x, his commanding officer commended him for completing Damage Control PQS and drawings of the ship's firemain, installed drainage, and installed AFFF systems. On February 27, 199x, the applicant qualified for the generator watch. On April 11, 199x, the applicant qualified for the auxiliary watch. On April 24, 199x, the applicant qualified as a duty damage controlman and duty electrician.

The applicant's Student Engineer Monthly Meeting Check-Off Sheet indicates that the applicant's supervisor did not formally counsel him in accordance with the SEP requirements after April 199x.

On June 19, 199x, the applicant's commanding officer noted that he completed the Damage Control Assistant course and the Advanced Fire Fighting course.

On October 29, 199x, the applicant qualified as a fuel, oil, and water king. On December 11, 199x, he qualified as a rigid boat inflatable hull engineer and a motor surf boat engineer.

On April 3, 199x, the applicant finished the SEP. His tour of duty on the xxxx ended three months later.

The First Disputed OER (OER1)

OER1 shows that, in addition to his duties as a student to “complete all ship-board qualifications,” he was assigned to serve as the EAA until January 199x and as such was responsible for maintenance of the engineering logs and forms. Overall, the applicant earned three marks of 5, seventeen marks of 4, one mark of 3, and two marks of N/O. On the Comparison Scale, he was rated a 4.² There is a significant amount of blank space left in some of the comment sections of OER1.

In block 3, Performance of Duties, the applicant received a mark of 3 for Responsiveness, and a mark of N/O for Warfare Expertise. The corresponding comments include the following statements:

Initial slow progress in student engineering program improved toward end of period, completing qualifications to underway auxiliary watch and making progress on AEOW/EOW qualification. Has difficulty reaching goals set by supervisor, but completed work of high quality. Prepared engineering files for MLC PAC administrative inspection which was passed smoothly as a result of his efforts. Completely reorganized ship’s drawing inventory, making it usable for crew. . . . Student engineering work completed so far has been of top quality. Spent several hours daily working on engineering repair and maintenance items. In spite of ship’s schedule preventing any formal training, completed damage control qualifications and became a contributing member to xxxx’s damage control team. Conducted many successful training sessions; notable one for senior personnel which drew praise from the XO.

In block 4, Interpersonal Relations, the comments note that he “[h]as actively supported fair treatment of others by volunteering to be teacher’s assistant at inner-city elementary school.”

In block 8, the reporting officer simply stated “I concur with [the supervisor’s] evaluations.” In the comments for block 9, Personal Qualities, the reporting officer wrote that “[the applicant’s] preparation of engineering files, obtaining course materials and assumption of lay leader duties showed good initiative and a sense of responsibility. These were somewhat offset by his slowness in completing student engineering requirements.” In the comments for block 10, Representing the Coast Guard, the reporting officer stated that the applicant “rarely deals with the public.” He made the following statements in block 11, Leadership and Potential:

² The Comparison Scale is not actually numbered but permits seven possible marks. The fourth position is the middle one of the three center marks labeled as “one of the many competent professionals who form the majority of this grade.”

This is [the applicant's] first OER. Though he was somewhat slow in completing portions of the student engineering program, he has shown improvement toward the end of the period. His continuing interest in the ship and high-quality work will make him a valuable member of the crew and officer corps. He is fully qualified for promotion to xxxxx.

The Second Disputed OER (OER2)

In OER2, the applicant's duties in addition to being a student engineer are listed as Repair II Locker Leader, Auxiliary Division Officer, and Fueling Officer. As a Locker Leader, the applicant completed "several drills during xxxx's recent REFTRA." Overall, the applicant received two marks of 5, seventeen marks of 4, three marks of 3, and one mark of N/O. He received a mark of 3 on the Comparison Scale. There is a significant amount of blank space left in some of the comment sections in OER2.

In block 3, Performance of Duties, the applicant received marks of 3 for Getting Results and Responsiveness and a mark of N/O for Warfare Expertise. The corresponding comments include the following statements:

As student engineer maintained slow rate of progress in qual[ifications] despite constant reminders and counseling sessions. Still working on Part A. Capable of producing high quality work Made vast improvements to divisional record-keeping accountability Had difficulty meeting deadlines, and often had to be prompted to increase productivity and output. Rarely kept chain of command informed about casualties and/or repairs. . . . Improved efficiency of refueling team Completed qual[ifications] through I/P EOW during recent patrol. . . .

In block 8, the reporting officer wrote "Concur with supervisor's marks and comments. I have observed [the applicant] for only 2 months, but that time was spent deployed on a xxxxx Patrol."

In block 9, Personal Qualities, the applicant received a mark of 3 for Initiative. The corresponding comments are as follows:

Has yet to complete Part A of his student engineering PQS. Qualified as inport and underway EOW in Sep 92 after almost 16 months on board. Efforts to improve fueling were effective due to his efforts. [Emphasis added.]

In the comments for block 10, Representing the Coast Guard, the reporting officer wrote that the applicant had "[a]bly represented the Coast Guard at a reception for VIP's in xxxxxx and during the xxxx."

In block 11, Leadership and Potential, the reporting officer described the applicant as follows:

[The applicant] is a quiet young officer who has been slow in working to complete Part A of his student engineer PQS. His work has improved greatly this period and he has proven that he can get the job done when properly motivated. With further work and improvement, he should be ready for promotion to LT with his peers.

First Affidavit of the Engineer Officer

The Engineer Officer who administered the applicant's SEP and served as the supervisor for the two disputed OERs submitted the following statements on the applicant's behalf:

. . . During the marking periods, I met with [the applicant] to review his marks, to ensure he understood them, and to counsel him for future performance. At those sessions, he questioned certain marks and comments that I made, indicating that they might have an adverse effect on his career. He believed that they would prevent him from selection for Lieutenant, but I advised him that he could "recover" from these marks with superior performance.

I presented what I consider to be a fair evaluation of [the applicant's] performance and skills. I did that in accordance with the Coast Guard Marking System, as I understood it. I have since come to believe that my understanding of the Coast Guard Marking System at the time was not in agreement with the Coast Guard's norm.

As Engineer Officer aboard CGC xxxx, I evaluated four (4) student engineer officers. Their ship experience was the first unit each of them had after being commissioned. All four of them were passed-over for selection to xxxxxx.

Ten "first-tour" officers reported to CGC xxxx while I was the Engineer Officer. Nine of them have now been passed-over for xxx and it is my belief that it was a direct result of their ship-tour evaluations.

It was not my intent to mark in accordance with any other standard than the Coast Guard's norm. It was not my intent that their evaluations would make it virtually impossible for them to be competitive with their peers in consideration for promotion to xxx.

I believe that several key items, such as low numeric scores and incomplete comments section remarks, sent an unintended message to the Promotion Board.

Although I believe I tried to meet the "letter" of the Coast Guard's Evaluation System, my comments and numeric marks for the Junior Officers, and [the applicant] in particular, reflected lower performance than I meant to convey. This appears to have been a ship-wide problem, since it is extremely unusual for 90% of the Junior Officers who have served at a Command to be passed-over.

I urge the Board for Correction of Military Records to correct [the applicant's] record so that he can be competitive with his peers in the promotion process.

Second Affidavit of the Engineer Officer

The Coast Guard submitted the following affidavit, also from the applicant's supervisor on the *xxxx*:

a. [The applicant] started the SEP on CGC *xxxx* when he reported on board. I expected that while the ship was inport that he would work on the parts of the program that could be done inport. During this time frame he could have completed system drawings and reviewed technical materials. If this was done it would have expedited his qualification process and changed my evaluation.

b. The SEP monthly counseling log was started in Aug 9x. In those counseling sessions we would review his work on the program. I would answer questions. During these sessions I reviewed his SEP notebook.

c. [The applicant] was told in these sessions that there were things that he could be working on for Part A of his SEP prior to the first patrol in Jan 9x. His progress through the program was slow and difficult. He had problems with watch qualification and trouble with engineering concepts. I frequently discussed [the applicant's] qualification and SEP progress with the Chief and Senior Petty Officers. They were responsible for training personnel during their watches. I understood the revised SEP as described in the COMDTINST.

d. I don't remember telling [the applicant] when he reported that completion of his inport EOW would suffice as research for Part A questions; therefore he would not have to write out answers for the questions. I do remember being surprised by the amount of written work that was required, and I knew that this was part of the program.

e. *xxxx's* schedule would have made underway watch qualification difficult, but this was not unique to *xxxx*. I knew that [the applicant] could work on Part B if the ship's schedule prevented the completion of Part A first. I also knew that [the applicant's] work as Engineer Admin Assistant was applicable towards some of his Part B completion. I considered this in my assessment in the first OER that his progress on completion of SEP was slow.

f. I placed [the applicant] on a port/starboard watch schedule during the first patrol because I thought that his progress was slow and that more time on watch would help him to progress. Also, watch rotation was used as a tool to encourage prompt qualification within the department, [and] it was important that all personnel be treated the same. Finally, the amount of underway time available to the [applicant] was limited and I wanted to ensure he made the most of it. In retrospect I do not think that the port/starboard watch rotation helped [the applicant].

g. [The applicant's] readiness to sit for the Aux Systems qualification board in Mar 9x was considered in my assessment of his SEP progress. I don't recall why his appearance before this board was held after his 31 Mar reporting period.

h. I did not feel that the use of the formal Officer Support Form (OSF) was necessary, since I met with him regularly to review his performance in the SEP; communication during these meetings was not limited to only the SEP. I also sat as an observer during his qualification boards, and I supervised him during the conduct of Engineering Plant drills. During the review of his SEP performance he would receive private counseling. After qualification boards he would be debriefed on his performance. After drills he would be debriefed as a team member. I felt that this counseling surpassed the requirements of the OSF.

Affidavit of the Applicant's Current Commanding Officer

The applicant's current commanding officer, a captain stationed at Coast Guard headquarters detached to the xxxxxx Command, submitted the following statements on behalf of the applicant:

2. I have been [the applicant's] commanding officer since May 199x. His performance in this time period is accurately documented in his OERs reviewed by me. His performance in my command is in stark contrast to that documented by xxxx. ...

4. I was a student engineer in CGC xx from 197x-197x. I also was the Engineer Officer (EO) of CGC xxx from June 198x to June 198x and administered the student engineering program to eleven junior officers.

5. CGC xxxx, xxxx, and xxx are all 378' Secretary Class Cutters and from an engineering standpoint are nearly the same.

6. In 199x, Coast Guard Naval Engineering issued a new student engineering program, which was very similar to the old in general requirements, but in addition, required written answers to specific and standard engineering questions where the old did not. However both the old and new programs require significant attention and mentoring by the Engineer Officer (EO) for the program to succeed in its objective.

7. In general, student engineering is divided up into two major parts: Part A is geared towards learning shipboard engineering watch requirements and tracing systems. Part B is predominantly focused on engineering administration.

8. From what the records show, it appears that when [the applicant] reported aboard xxxx, the first four to five months were spent inport with no underway time. This time inport is ideally suited for the student engineer to begin some of Part B because most inport periods see a great deal of admin. Further it is extremely difficult if not impossible to complete Part A in the time recommended by the program if the ship is not underway. One can't very well

qualify for underway watches while inport. The prudent mentor would restructure the student engineering program to accommodate this factor. In fact, my EO did change the program for me and my classmate for this very reason in 197x-7x. It was unfortunate that when [the applicant] reported aboard there was not a seasoned EO to act as mentor and get him and his classmate off to a good start. And whatever orders or guidance were given, two months or so later when the EO arrived, new direction was given and that direction did not account for the long inport either. So when OER time came, and Part A should have been completed under normal circumstances, [the applicant] had not completed it. Given the long inport for the first five months of [the applicant's] career, it realistically should not have been expected. In my opinion, the EO should have restructured the entire program to fit the expected underway/inport schedule, and marked [the applicant] according to the new plan.

9. In reviewing [the applicant's] OERs from xxxx, my first thought was, "Why didn't the XO or CO discuss these OERs with the EO and member before submitting it?" Any CAPT or CDR in the Coast Guard should have known that these marks and remarks were certain to be detrimental in a promotion board. And yet it did not appear that any effort was made by the command to validate the marks and comments as accurate. As it turned out, almost the entire junior officer corps of the wardroom faced the same problem. Given the general marks on the ship, how would an xxx or xxx be aware that the marks he was just given would almost certainly get him passed over for xxxx?

Calendar of the Applicant's Tour on the xxxx

YR	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL
9x-9x	Report 8/28/9x						A*					
9x-9x			A**	B*					SEP done 4/3/9x			Leave 7/2/9x

-  Reporting period for first disputed OER
-  Reporting period for second disputed OER
-  xxxx primarily in port with applicant on board
-  xxxx primarily underway with applicant on board
-  Applicant away at school while xxxx underway
- A* = SEP recommended completion date for Part A
- A**= Date applicant completed most of Part A and began Part B
- B* = SEP recommended completion date for Part B

VIEWS OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On February 18, 1999, the Chief Counsel of the Coast Guard recommended denial of the applicant's request for lack of proof. He argued that the following standards should apply:

To establish that an OER is erroneous or unjust, the applicant must show a misstatement of a significant hard fact or a clear violation of a statute or regulation. Germano v. United States, 26 Ct. Cl. 1446, 1460 (199x); CGBCMR Dkt. No. 86-96. In determining whether the applicant has met this burden, Applicant's rating officials are strongly presumed to have acted correctly, lawfully, and in good faith in executing their duties. Arens v. United States, 969 F.2d 1034, 1037 (199x); Sanders v. United States, 594 F.2d 804, 813 (Ct. Cl. 1979). Moreover, to be entitled to relief, the Applicant must not only prove error or injustice, but also must make at least a prima facie showing of harm to his record as a result of that error. See, e.g., Engels v. United States, 230 Ct. Cl. 464, 470 (1982). Absent a showing that error or injustice affected the challenged record, it is inappropriate for the Board to change the evaluations of those responsible for evaluating the reported-on officer under Coast Guard regulations. See, e.g., Opinion of the Deputy General Counsel in CGBCMR Dkt. No. 84-96, citing Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981).

The Chief Counsel alleged that the applicant failed to meet these standards because the evidence "demonstrates that the challenged OERs represent the honest professional judgment of those responsible for evaluating Applicant under the Coast Guard Officer Evaluation System." He argued that the record shows that the applicant received fair and objective OERs from his rating chains. "Applicant's statement is replete with his own characterizations of conduct, but he has failed to prove by a preponderance of the evidence that an error or an injustice [exists] in the disputed OERs."

The Chief Counsel alleged that the applicant's supervisor had properly administered his SEP. He attached to his advisory opinion a copy of a memorandum from the Coast Guard Personnel Command (CGPC) which comes to this conclusion (see below). The Chief Counsel further alleged that, in his application to the Board, the applicant mischaracterized the nature of his duties under the SEP. He argued that the supervisor had set reasonable goals for the applicant at their initial meeting in August 199x and that the applicant had failed to meet those goals. The supervisor's evaluation of the applicant in light of that failure should not be reversed by the board absent proof of a factual or legal error.

Furthermore, the Chief Counsel pointed out that the applicant had failed to "exercise his right to submit OER replies to the two disputed OERs." This failure, the Chief Counsel argued, "may be considered as evidence that he accepted the rating official's characterization of the performance described in those OERs."

Regarding the effect of the disputed OERs on the applicant's failures of selection, the Chief Counsel chose not to submit a "nexus analysis" in the interests of administrative efficiency but offered to do so should the Board find that one of both of the disputed OERs were erroneous.

Memorandum of the Coast Guard Personnel Command

The Chief Counsel attached to his advisory opinion a memorandum from the Coast Guard Personnel Command (CGPC). The memorandum stated that "[w]hile the guidance provides flexibility for completion of some Part 'B' requirements due to the cutter's deployment schedule, the Supervisor was not in error in requiring Applicant to make progress on his Part 'A' during the four month inport period." CGPC argued that making progress on Part A during the xxx's time in port was feasible and a reasonable expectation of the Supervisor. Furthermore, CGPC stated that, in an affidavit submitted by CGPC with its memorandum, the applicant's supervisor contradicted the applicant's allegation that his supervisor told him he would not have to complete the written parts of Part A. CGPC argued that it was the applicant's responsibility to clarify any discrepancy between the SEP requirements and his supervisor's requirements, and the applicant did not do this.

CGPC stated that the applicant's assignment as Engineer Administrative Assistant and Damage Control Personnel Qualification Standards officer was not in violation of Article 3.c. of the SEP because the duties were "related to applicant's student engineer program and were considered by the Supervisor in his assessment of applicant's SEP progress in his evaluation." CGPC also stated that the applicant's assignment to port and starboard watch duty was within his Supervisor's discretion, was intended to further his progress, and was not in violation of Article 5.a.(3)(a)3. of the SEP even though it is more stringent than the prescribed watches. CGPC concluded that the "[a]pplicant did not provide convincing evidence to support his contention that his [SEP] was administered incorrectly by his Supervisor, or that if it was, that it resulted in an inaccurate evaluation of his performance."

Regarding the first disputed OER, CGPC stated that it is not clear in the OERs whether the "applicant's interpretation of how to complete the answers for Part 'A' affected his evaluation of his performance." CGPC pointed out that in his affidavit, the applicant's supervisor stated that he did take into account in OER1 that the applicant was ready to sit for the Auxiliary Systems qualification board even though the board was not held until after the reporting period ended. CGPC further stated that the low marks in the two disputed OERs are amply supported by the comments and by the supervisor's remarks in his affidavit that the applicant's progress was "slow and difficult." CGPC also stated that the mark of "not observed" that the applicant received for Warfare Expertise is "a neutral evaluation that should not be held for or against the Reported-on Officer." There is no evidence, CGPC alleged, that the reviewer for the OERs did not do his job.

Regarding the supervisor's failure to use the Officer Support Form (OSF), CGPC argued that "there is no proof that failure on the part of the Supervisor to use the specified OSF form caused an error in applicant's evaluation." CGPC further stated that, although documentation of formal counseling ceased during the second reporting period, the "applicant himself states that verbal counseling continued during the second OER period," and the supervisor's affidavit also indicates that counseling continued. Finally, CGPC stated that OERs may legitimately provide reported-on officers with incentive to improve their performance, and the supervisor's mention of this fact "does not mean that the OERs were not accurate assessments of applicant's performance, nor does it invalidate the two OERs." CGPC concluded that the "[a]pplicant did not provide convincing evidence to support his contention that there was administrative irregularity in the OER completion process for his two contested OERs, or that if it existed, resulted in his being evaluated unfairly."

CGPC admitted that the comment in OER2 indicating that as of September 199x, the applicant had been on board the xxxx for 16 months was wrong. CGPC recommended that the comment "after almost 16 months on board" be removed. CGPC also admitted that the comment concerning the applicant's performance at a reception during the xxxx race may have been wrong, but stated that removal of the comment is not in the applicant's best interest.

Regarding the effect of the disputed OERs on the applicant's failures of selection, CGPC stated that the applicant's record would appear significantly stronger without the two disputed OERs. Therefore, if the Board were to disagree with the Coast Guard and remove the OERs, the applicant's failures of selection should also be removed.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 24, 1999, the Chairman sent a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. The applicant's attorney asked for several extensions of this time and responded on July 29, 1999.

In his response to the advisory opinion, the applicant argued that the Chief Counsel's dependence upon the "presumption of regularity" ascribed to Coast Guard officers does not overcome the regulatory requirement that OERs be fair and accurate. Moreover, the presumption is overcome since the applicant's supervisor has admitted that the discretion exercised in administering the SEP program and evaluating the junior officers on the xxxx resulted in 90 percent of them being passed over for promotion. He stated that the honesty of the rating chain is beside the point because he was being evaluated "on the basis of erroneous duty standards."

The applicant submitted an affidavit from his current commanding officer (see below) alleging that the administration of the applicant's SEP program was faulty. He

stated that because his SEP was wrongly administered, and he was evaluated on the basis of his inability to fulfill incorrect and impossible expectations, the disputed OERs are inaccurate and should be removed from his record.

The applicant also stated that his failure to file OER replies should not be held against him as he "was misled into believing that the marks he was assigned were not detrimental and he was unaware of any need to respond to them."

In response to CGPC's memorandum, the applicant stated that in OER1 the comments do not support the mark of 3 he received in block 3.d. Therefore, a mark of at least 4 should have been assigned. The applicant also stated that the errors in the disputed OERs concerning how long he had served on the *xxxx* and whether he had assisted at the *xxxx* reception are evidence of "the general degree of inaccuracy" in the challenged OERs. Furthermore, he stated that, because the Personnel Manual requires an OER reviewer to ensure the accuracy of the OER, it is clear that the applicant's reviewer did not do his job. Finally, the applicant argued that the statements made by his supervisor regarding the accuracy of his evaluation of the applicant in the affidavit submitted by the Coast Guard are contradicted in the supervisor's first affidavit, which was submitted by the applicant, in which he admits that the rating of junior officers on the *xxxx* must have been incorrect.

FINDINGS AND CONCLUSIONS

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

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

2. The applicant requested an oral hearing before the Board. The Chairman, acting pursuant to 33 C.F.R. § 52.31, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant alleged that two OERs he received while serving aboard the *xxxx* should be removed because they are inaccurate. He alleged that they are inaccurate because certain low marks were not supported by comments. The Board finds that the numerical marks in the two disputed OERs are sufficiently supported by the corresponding comments.

4. With regard to OER1, the applicant alleged that it is inaccurate because it states that he rarely dealt with the public, whereas he had volunteered at a local elementary school and received a Humanitarian Service Medal for volunteering to help during an October 199x fire. In addition, OER1 contains a significant amount of blank

space in the sections for written comments. In the Board's experience, so much blank space is unusual and prejudicial to the reported-on officer. The excessive blank space and the inaccurate remark about the applicant's work with the public are evidence that the OER1 was carelessly prepared and does not fully document the applicant's performance.

5. With regard to OER2, the applicant alleged that it is inaccurate because it states that he had been on board 16 months at the end of the reporting period and that he had worked on the xxxx reception. In fact, he had been on board for only 13 months. Furthermore, at the time of the xxxx reception, he was away at school. The applicant alleged that these errors prove OER2 was not properly reviewed. The Board finds that these errors indicate that OER2 was carelessly prepared. Moreover, OER2 included the inaccurate and very prejudicial comment "Has yet to complete Part A of his student engineering PQS. Qualified as inport and underway EOW in SEP 9x after almost 16 months on board." This exaggerated the slowness of the applicant's qualification for watches and strongly implied that the applicant had ample underway time in which to qualify for watches and complete Part A of the SEP. At the end of the second reporting period, the applicant had been on board for only 13 months, less than 5 of which were spent underway. The SEP Instruction recommends that Part A be completed within 6 months.

6. The applicant alleged that both OER1 and OER2 wrongly indicate that his rating chain had no occasion to observe his warfare expertise. The applicant's supervisor could have assigned him numerical marks for the category Warfare Expertise in the two disputed OERs based on his performance during training for fire fighting and damage control. However, the supervisor's decision to mark the category "not observed," in the absence of actual combat experience, is not clearly erroneous. In the Board's experience, a mark of "not observed" for the category Wartime Expertise is so common as to be expected and, therefore, is not at all prejudicial to members. Furthermore, the applicant's training that would have provided the basis for a numerical mark in this category was cited in other parts of the disputed OERs.

7. The applicant's supervisor admitted that he did not make use of the OSF forms submitted by the applicant for either OER1 or OER2 to evaluate and counsel him as required by Article 10-A-2(d)(3) of the Personnel Manual. The supervisor alleged that he was sufficiently familiar with the applicant's performance to obviate the use of OSFs. However, the supervisor's statement is unconvincing given the errors and blank spaces in the disputed OERs. Therefore, the Board finds that the supervisor's failure to use the OSFs as required may have unjustly caused the disputed OERs to reflect unfavorably on the applicant's performance.

8. The applicant alleged that the low marks and supporting comments in the disputed OERs reflect his inability to fulfill his supervisor's unreasonable expectation that he complete Parts A and B of the SEP in the prescribed order. The applicant

alleged that his supervisor's expectations were unreasonable because the xxxx's schedule did not permit him to complete Part A within the recommended time and because the supervisor did not permit him to start on Part B prior to Part A, in accordance with the SEP Instruction that provides for such flexibility when a cutter's schedule precludes the usual order.

9. The xxxx was in port for the first four and one-half months of the applicant's tour. Therefore, the applicant alleged, his supervisor should have instructed him to work on Part B, credited his work as EAA toward completion of Part B, and evaluated him in OER1 on that basis. The SEP Instruction stated that "initial emphasis shall be placed on Part 'A' with adjustments as necessary to fit the cutter's schedule and the student's progress." In light of (a) the flexibility allowed in the SEP, (b) the xxxx's long inport schedule, and (c) the applicant's assignment to the major collateral duty of EAA, which work could have counted toward the completion of Part B of the SEP, the Board finds that the applicant's supervisor acted unreasonably in refusing to permit any of his EAA duties to count toward completion of Part B.

10. The applicant alleged that he received poor marks and comments in OER1 because his supervisor wrongly expected him to have progressed further on Part A of the SEP than was physically possible given the xxxx's schedule, his appointment as EAA and DCPQS officer, and his assignment to port and starboard duty. The applicant's supervisor admitted in his first affidavit that the applicant was downgraded in OER1 for not having progressed fast enough on Part A. However, while the xxxx was in port, the applicant was assigned the major collateral duties of EAA and DCPQS officer. And by the end of the reporting period for OER1, the xxxx had been underway for only two months. During those two months, the applicant qualified for the security, generator, and auxiliary watches, although the auxiliary watch board was delayed until after the reporting period ended. The applicant also qualified as a duty damage controlman and duty electrician soon after the reporting period for OER1 ended. These watch qualifications were completed while the applicant was assigned to port and starboard duty, a clear violation of Paragraph 5.a.(3)(a)3. of the SEP Instruction. In light of these circumstances, the Board finds that the applicant's supervisor unfairly downgraded his performance in OER1 for not having progressed further on Part A of the SEP. The Board finds that the applicant's slow progress on Part A during the first reporting period was due to no fault of his own, but to the xxxx's inport schedule and the applicant's assignment to major collateral duties during inport time and to port and starboard watches during underway time. It was unjust for the applicant to be downgraded in OER1 on this basis.

11. The applicant alleged that he received poor marks and comments in OER2 because his supervisor wrongly expected him to have progressed more quickly on Parts A and B of the SEP than was physically possible given the xxxx's schedule, the applicant's attendance at DCA school during rare underway time, and an unforeseen number of written answers required for completion of Part A. The applicant alleged

that when he arrived on the *xxxx*, his supervisor told him he would not have to provide written answers to Part A because “all research called for in Part ‘A’ would be covered in the watch qualification process.” The supervisor does not remember this but does remember being “surprised” at how much written work was required, although he also claimed to have “understood the revised SEP” prior to administering it. OER2 clearly indicates that the applicant was downgraded for not completing Part A. Yet he had experienced only 5 months of underway time, when the SEP Instruction suggests that Part A should be completed within 6 months.

12. The applicant also alleged that he was not sufficiently counseled concerning his progress on the SEP. The applicant’s supervisor failed to sign the monthly check-off sheet throughout the second reporting period. Furthermore, the supervisor also failed to use the required OSF forms to counsel the applicant. The record shows that the applicant received very little one-on-one counseling concerning his progress in the SEP program, as required by Paragraph 5.a.(3)(b) of the SEP Instruction. Yet the SEP Instruction states that “[i]t cannot be stressed enough that the success of this program hinges on the Engineer Officer’s involvement.” The affidavit from the applicant’s current commanding officer, who has intimate knowledge of the SEP and how it should be administered, strongly supports the applicant’s allegation that he was insufficiently counseled and that his SEP was poorly administered. In light of the supervisor’s failure to counsel the applicant properly and his apparent unfamiliarity with the amount of written work required, the Board finds that the applicant’s SEP was poorly and improperly administered during the reporting period for OER2. Therefore, the applicant’s slow progress was due to no fault of his own, but to the *xxxx*’s schedule and his supervisor’s improper administration of the SEP. It was unjust for the applicant to be downgraded in OER2 on this basis.

13. The applicant alleged that the fact that ten junior officers who served aboard the *xxxx* from July 199x to July 199x have been passed over for promotion and forced to retire proves that his evaluation was inaccurate. Although the alleged pass over rate for the *xxxx*’s junior officers is extremely unusual, it is not necessarily probative of the accuracy of the applicant’s own OERs.

14. The applicant also alleged that his rating chain purposefully and wrongfully downgraded him to motivate him to work harder. The applicant’s supervisor signed an affidavit stating that the disputed OERs were honest and accurate evaluations of the applicant’s performance. The Chief Counsel argued that the disputed OERs should not be removed because they “represent the honest professional judgment of those responsible for evaluating Applicant.” The Board is not persuaded that the applicant’s rating chain acted in bad faith in downgrading him. However, a lack of bad faith does not mean that the OERs are fair and accurate reflections of the applicant’s performance.

15. The Chief Counsel also argued that the applicant's failure to file replies to the disputed OERs should be considered evidence that he accepted his rating chains' evaluations of his performance. The Board does not believe that the applicant's failure to reply at the time should deny him relief from errors the Coast Guard committed with regard to the disputed OERs.

16. The Chief Counsel alleged that the applicant's supervisor had properly administered the SEP. He argued that the record shows that the supervisor set reasonable goals for the applicant during the two reporting periods, which the applicant failed to meet. However, given the facts and circumstances detailed in the findings above, the Board finds that the applicant has proven by a preponderance of the evidence (a) that both OER1 and OER2 were prepared without proper care and contain errors and omissions prejudicial to the applicant; (b) that his supervisor poorly and improperly administered his SEP program; (c) that he was insufficiently counseled concerning his progress and performance; (d) that his performance was unfairly downgraded in OER1 and OER2 due to the improper administration of his SEP and unreasonable expectations of his supervisor; and (e) that the disputed OERs are therefore unjust and untrustworthy evaluations of the applicant's performance.

17. Although the Chief Counsel did not submit a nexus argument, the Coast Guard Personnel Command admitted that the presence of the disputed OERs in the applicant's record are likely to have caused his failures of selection. The Board finds that the applicant's record is much stronger without the disputed OERs and that, were the disputed OERs not in the applicant's record, he may well have been selected for promotion.

18. Accordingly, the applicant's request should be granted.

[ORDER AND SIGNATURES APPEAR ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of XXXXXXXXXX, USCGR, is granted as follows:

The applicant's OERs covering the periods August 17, 199x, to March 31, 199x, and April 1, 199x, to September 30, 199x, shall be removed from his record. They shall be replaced by OERs marked "For Continuity Purposes Only."

The applicant shall be returned to active duty as a xxxxxx in the regular Coast Guard with no break in service or retirement shown in his record. The applicant shall receive any back pay and allowances he is due as a result of this correction. Should the applicant's accumulated leave then exceed 60 days, he shall be permitted to sell the excess (number of leave days over 60) to the Coast Guard without diminishing his total career entitlement to sell back leave.

The applicant's failures of selection to the rank of xxxxxx shall be removed from his record. The applicant shall be considered for promotion by the next two xxx selection boards to meet after he has received two regular OERs that document his performance following his return to active duty by this Order. The applicant shall be considered by the first of those two boards as an officer "within the zone."

If the applicant is selected for promotion by the first xxx selection board to consider his record as corrected by this Order, upon promotion, the applicant's date of rank shall be the date of rank he would have received had he been selected for promotion by the 199x selection board, and the applicant shall receive all back pay and allowances due him.

Charles Medalen

James G. Parks

Jacqueline L. Sullivan

