

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-007

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

ANDREWS, Deputy Chair:

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 docketed on October 27, 2003, upon the BCMR's receipt of the applicant's application.

This final decision, dated July 29, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his military record by removing a very poor special officer evaluation report (SOER) that he received for his service as the Executive Officer (XO) of the cutter XXX from June 1 until October 8, 2001, when, he alleged, he was relieved of duty because of a personality conflict with his commanding officer (CO); by removing the regular OER that he received for his service from October 9, 2001, to May 14, 2001; and by modifying a concurrent OER (COER) that he received for a temporary assigned duty (TAD) assignment to a shore unit from October 9, 2001, to May 15, 2001, to make it appear to be his regular OER for that period.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On March 27, 1991, the applicant received his commission as an ensign. From May 22, 1991, to June 30, 1993, he served as a deck watch officer on a cutter, earning primarily marks of 5 (on a scale of 1 to 7, with 7 being best) on his OERs. He was promoted to lieutenant junior grade on November 22, 1992.

From July 1, 1993, to July 28, 1995, the applicant served as project officer for two new classes of buoy tender and again received primarily marks of 5 on his OERs. After being assigned to graduate school, he was promoted to lieutenant on November 22,

1995, and earned a master's degree in electrical engineering. From December 24, 1996, until May 19, 1998, the applicant served as a project engineer and earned primarily marks of 5 on his OERs and an Achievement Medal for this work.

From February 20, 1998, to April 14, 2000, the applicant served as the XO of the XXXXX, a buoy tender. He earned primarily marks of 5 on the two OERs he received from two different captains for this service and was recommended by both for promotion "with his peers" and for command afloat. Both captains certified him for command at sea so that he could command the tender when the captain was absent.

On April 15, 2000, the applicant was transferred to another buoy tender, the XXXX, for a period of five months during which it was decommissioned. On May 29, 2000, the captain (CO) certified him for command at sea on the XXXX, citing the "seamanship, leadership, personal commitment, and responsibility demonstrated in [his] outstanding performance of duties" as the XO.

On July 6, 2000, the CO gave the applicant a memorandum about her "command philosophy" and her expectations of him. She stated that an efficient ship required safe work practices; training; and proper treatment of the crew, which required treating all with respect. She advised him to include the chiefs, as the ship's "experience base," in his decision-making. She stated that she expected him to follow her policies, but that she would interfere as little as possible and would "allow you or others in authority to take action contrary to what I might decide in a given situation, provided they are using their best judgment." She stated that when she gave orders directly to another officer or chief, she would inform him. She stated that, when a problem arose, he should study it and bring her a recommendation that he would sign off on himself if he were the captain with his professional reputation in the balance. She stated that she did not want to be surrounded by "yes-men" and wanted to hear his views—which she would respect if not agree with—but that once a decision was made, he should support it even if he did not agree with it. She advised him to become very observant so that he would know more about the ship and its status and condition than anyone. Finally, she stated that his success as XO "is one of my most important and fulfilling responsibilities as a Commanding Officer."

On July 9, 2000, the CO asked the District Commander for permission to have the applicant act as commanding officer from August 9 through 12, while she went on TAD. She stated that the applicant "is a seasoned xxxxx sailor and exceptional leader. He has earned my complete faith and highest recommendation for command."

In September 2000, the crew of the XXXX was transferred to its replacement, the XXX, which then underwent five months of pre-commissioning, a two-month "shake-down cruise," and its maiden voyage from xxxxx to its home port in xxxxxx. As XO, the applicant supervised four junior officers and forty enlisted members. On the applicant's OER for the period from April 15, 2000, to May 31, 2001, the CO assigned him ten marks of 4, six marks of 5, and one mark of 6 in the various performance

categories, and a Comparison Scale mark of 4.¹ She noted in the OER that he was “an extremely competent sailor,” “my most trusted Deck Watch Officer,” and “an [Aids to Navigation] expert.” She also noted that he had already been selected for promotion to lieutenant commander, and she recommended him for promotion “with his peers.” In addition, she stated that he “strongly desires and is well on his way to earning my recommendation for command of a 180’ or 225’ buoy tender.”

On October 8, 2001, the CO ordered the applicant to leave the XXX. On October 18, 2001, the CO sent him a letter regarding his “Temporary Relief for Cause of Executive Officer” due to “Unsatisfactory Performance and Loss of Confidence.” She stated the following in pertinent part:

2. You have demonstrated a substandard performance of duty over an extended period of time with your major weaknesses being follow through and interpersonal skills. In spite of extensive coaching and counseling by warrant officers, chiefs, and me, improvements never came about. Your poor performance negatively impacted the morale and readiness of XXX and her crew.

3. I have lost confidence in your ability to perform the duties of Executive Officer. I did not make this decision lightly. In a series of counseling sessions we created a system to track tasks and improve your dealings with subordinates. Still, you needed continued reminders to stick with those written, agreed upon deadlines, and you simply failed to understand how you infuriated those around you. The final straw was 05 October when I realized that I could no longer trust you to run any meetings aboard XXX. Your lack of preparation and ability to listen and work with others was extremely detrimental to running a ship. I was, in essence, going to take over your duties as Executive Officer, which would be unfair to you, the crew, and me.

4. I am completing a Special OER in accordance with [Article 10.A.3.c.(1)(a) of the Personnel Manual], which will more specifically document your performance. This letter and a review of our counseling sessions, beginning with your mid-period review of performance before your OER of May 2001 and ending with my decision to not allow you to run any meetings aboard XXX, should give you a clear understanding of why I made this decision.

The CO also prepared an SOER, and both it and the letter were forwarded by the District Commander to the Coast Guard Personnel Command (CGPC) on November 6, 2001, with his concurrence in her actions. He also recommended that “the promotion review process take its course with due consideration of the officer’s performance over his career and not be based entirely on this period.” In this SOER, the applicant received nine marks of 3, six marks of 4, and three marks of 5 in the performance categories and a mark of 4 on the Comparison Scale. However, on November 9, 2001, the CO rescinded her letter (apparently after being advised that she did not have authority

¹ The Comparison Scale on an OER is not actually numbered, but there are seven possible marks. The Reporting Officer is supposed to mark an officer on the scale by comparing that officer with all of the other officers of the same rank whom the Reporting Officer has known. A mark in the fourth, or middle, spot on the scale denotes a “Good performer; give tough challenging assignments.” A mark in the fifth spot on the scale, which the applicant had received in his prior OERs, would have denoted an “Excellent performer; give toughest, most challenging leadership assignments.”

to relieve him “for cause”) and replaced it with one with an identical text except that it was titled “Performance of Duties,” instead of “Temporary Relief for Cause of Executive Officer.”

The SOER that the CO prepared was returned to her by CGPC for revision. In the revised and final version, which appears in the chart below, four marks were lowered by one place and the Comparison Scale mark was lowered from 4 to 3. In addition, some of the comments were slightly revised. (N.B., The bold letters inserted in the text refer to correspondingly lettered allegations by the applicant below. The ellipses appear in the original and do not indicate actual omissions.)

MARKS AND COMMENTS IN SOER

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	3	<p>A Lacked ownership & follow up, frequently caught unprepared. B Realized property lists & inventories had never been established when DX msg arrived. Demanded wall-to-wall inventory during 2-wk drydock in Aug w/out review of Comdt guidance or consideration of officers' (Os) & chiefs' (CPOs) input on magnitude of job, best way to manage, and disruption to their worklists on short notice ... C His poor handling of ship's finances was a constant frustration for Os and CPOs. He never knew how much money was left, held onto and lost purchase requests (PRs). Realized after end of FY that another \$25K could have been spent, including \$15K of needed deck gear that he approved at last minute without competitive bids, putting SK in untenable spot of making illegal purchase ... D Dropped ball on MLCP Compliance Checklists I directed him to base admin pgms for new ship, in spite of written deadline and reminders. E Met with training board to plan trng for upcoming patrol, instead required board mbrs to develop and submit drill scenarios so that he could select 'grab bag' style ... Did not apply right level of attention to situations: F overreacted to possible late marks; G did not follow up on assignments, resulting in unnecessary crisis management ... H A capable ship handler and coach for conning officers. Quickly grasped intricacies of using dynamic positioning system for buoy tending and moorings and unmoorings. Excellent eye for buoy deck safety, often first to catch deficiencies.</p>
3b	Using Resources	3	
3c	Results/ Effectiveness	3	
3d	Adaptability	3	
3e	Professional Competence	4	
4a	Speaking and Listening	3	<p>I Often cut people off when they were making a point & provoked disagreements. I counseled him not to argue with CPOs in front of crew. Later, ordered him not to include CPOs at his planning mtgs due to how confrontational they were. Finally, I would not allow him to hold any mtgs w/out me due to his lack of preparation & positive results & inability to present my desires and tone ... Drafted persuasive cover letter for engineering change request outlining operational & engineering reasons why electrical shore tie isolation transformer should be installed on ship vs pier.</p>
4b	Writing	5	
5a	Looking Out for Others	4	<p>Swiftly dealt with emergencies: arranged for leave in family crises; released members for mental health treatment ... Effectively trained new DWOs. Assisted CPO struggling to put together Morale Rpt ... J Unprepared for budget, trng & property mtgs he called, ended in frustration for attendees due to vague & unrealistic goals he set. K Showed up at budget mtg w/ pile of PRs & last known amt of funds, threw PRs on table for attendees to sort/prioritize. L Held last trng board w/out DCA & Trng Officer, M did not follow my direction to have in port drills graded by Damage Control Training Team. N Failed to meet agreed upon, written deadlines. O As Acting CO in port, failed to weigh-in E-4 before advancing him despite prior reminder. After more prompting from me found member overweight. P Subverted chain of command by tasking CPOs directly or passing info to E-6s without informing CPOs & dept heads ... Unskilled at leading or being a part of a team. Q Asked for input, but always pointed out why those ideas wouldn't work, leading to unproductive discussions. R I often had to intervene to diffuse hostilities and refocus the group on the issue ... S Sent scathing e-mails to Os/CPOs/ESU, never apologized even when demoralizing impact was pointed out. Threatened to 'skin' anyone using YN's absence as excuse for turning in marks late ... T Submitted OERs to me 1-2 weeks late.</p>
5b	Developing Others	4	
5c	Directing Others	3	
5d	Teamwork	3	
5e	Workplace Climate	3	
5f	Evaluations	3	
6	Signature of the CO as the applicant's Supervisor, dated November 9, 2001		
7	Reporting Officer's Comments	NA	<p>U [The applicant] has not gained my confidence in his ability to effectively lead and manage the crew because of his abrasive personality & inability to listen to others. Lacks sense of follow through as demonstrated by his financial management of the ship's budget. His operational judgment is impaired by not listening to recommendations of his watch team. I need a backup, an XO who can qualify for command and act on my direction to bring the Os and CPOs together to achieve the level of performance I demand without using threatening tactics to achieve results.</p>
8a	Initiative	4	<p>Pursued career development opportunities. Volunteered as member of admin discharge board for a local unit and as a meeting facilitator for another command ... V Did not earn command at sea certification aboard XXX. W As conn during up bound transit of xxxxxx River, did not heed nav team input that he was getting more left of track, kept steering courses to the left of base course. Crossed into down bound lane and nearly left channel in front of a vessel he agreed to pass port to port. X Advice often shortsighted. Y Urged me verbally and by memo to skip xxxxxx and delay homecoming after 4 mos away to get hull repainted, in spite of lack of urgency and negative effect on those waiting for us in Xxxxx, not to mention a contract could not be arranged that fast. Z Quick to give up during challenging buoy positioning and buoy mooring retrieval rather than explore alternatives As Acting CO in port, took E-3 to mast for repeatedly showing up late and dealt with underlying alcohol issue ... Left positive impression on xxxxx Navy League. Looked & performed sharply in FDBs at Commissioning Ceremony, crew followed suit ... Advocate of Chaplain Program for crew well-being. Invited incoming and outgoing xxx Chaplains to sail w/ ship.</p>
8b	Judgment	3	
8c	Responsibility	4	
8d	Professional Presence	4	
8e	Health & Well-Being	4	

9	Comparison Scale	3	See footnote 1 above. A mark in the third spot on the Comparison Scale denotes a "Fair performer; recommended for increased responsibility."
10	Potential	NA	The Coast Guard should capitalize on [the applicant's] Master's Degree in Electrical Engineering and his WLB experience by assigning him to technical billets that help support the fleet. He has been selected for Lieutenant Commander and should be promoted with his peers.
11	Signature of the CO as the Reporting Officer, dated November 9, 2001		
12	Signature of CDR S, Chief of the District Aids to Navigation Branch, as Reviewer, dated November 13, 2001		

The Reviewer for the SOER, who was the Chief of the District's Aids to Navigation Branch, added a page of his own comments, as follows:

[The applicant's] performance has been such that it has prevented [the CO] from being able to develop confidence in him to carry out her direction and to command in her absence. This lack of trust and confidence was critical in her decision to relieve [him]. [The CO] has been distracted from her duties in order to compensate for [his] administrative performance. He also demonstrated operational decision-making that is contrary to safe and efficient cutter operations raising doubts as to his ability to appropriately evaluate risk.

[The CO] attempted to guide [the applicant] towards successful execution of all his duties with only minor success. Immediately following counseling sessions [he] would respond positively then revert back to his less than acceptable performance.

[The applicant's] strengths in electrical engineering should be considered in future assignments. He took the lead in writing an in-depth Engineering Change Request potentially improving the power system in the WLB 225 cutter class. His technical writing is convincing, logical and well suited to the audience.

I disagree with [the CO's] recommendation for promotion. [The applicant's] performance this period is not indicative of the potential necessary to assume positions of greater responsibility associated with the next higher grade.

After being removed from the XXX on October 8, 2001, the applicant was assigned on a TAD basis to the Integrated Support Command (ISC), where he served as the Officer of the Day and was responsible for various special projects. On November 16, 2001, the CO of the XXX forwarded him a certificate awarding him a permanent cutterman's pin, which she had signed on October 29, 2001, with a note of congratulations.²

On December 21, 2001, the applicant submitted a reply to the SOER, asking that it be filed in his record. In it, he wrote only that "[g]iven the time, length and content limits set by [the Personnel Manual], I am compelled to limit this reply to a request that readers of this OER consider it in light of my other OERs and my entire [personal data record]." After it was forwarded to CGPC by his chain of command, it was rejected by CGPC, apparently by email. On March 26, 2002, CGPC sent the applicant a formal letter rejecting his reply for "deficiencies" and inviting him to submit a new reply within

² Under Chapter 7.3. of COMDTINST 3502.4E, the award of a permanent cutterman's pin requires completion of five years of sea duty and the recommendation of one's commanding officer.

thirty days. CGPC stated that an OER reply “is subject to the same rules and restrictions in terms of content and preparation as is an OER.” CGPC pointed out that Article 10.A.4.g.2. of the Personnel Manual required comments to be “performance based, either addressing performance not contained in the OER or amplifying the reported performance” and that “[c]omments pertaining strictly to interpersonal relations, a personal opinion of abilities, or qualities of a rating chain member” are not permitted. CGPC stated that the rules also prohibit comments about performance that occurred outside the period and that his request that readers of the OER “consider it in light of my other OERs” implies that his rating chain “did not objectively document [his] performance during this time period, although other rating officials had during their evaluation periods.” On April 30, 2002, the applicant sent CGPC a letter objecting to their determination and asking that the time for submitting a reply be extended “until I have time to receive a ruling from the PRRB/BCMR regarding my original reply.”³ His request was granted on July 24, 2002.

The applicant was promoted to LCDR as scheduled on January 1, 2002. On April 9, 2002, he requested a rating chain exception to allow his chain of command at the ISC prepare his next regular OER. However, this request was not granted. For the period October 9, 2001, to May 14, 2002, the applicant received a regular OER from the CO of the XXX with all performance categories marked “not observed,” and a substantive concurrent OER (COER) covering his TAD assignment at the ISC. He received ten marks of 4, seven marks of 5, one mark of 6, and a Comparison Scale mark of 4 on the COER.

On May 15, 2002, the applicant became the XO of an Electronics Systems Support Unit. On his first OER at this unit, he received eleven marks of 6 and seven marks of 7 in the performance categories and a 5 on the Comparison Scale. On his second and most recent OER, he received thirteen marks of 5 and five marks of 6 in the performance categories and a 4 on the Comparison Scale.

APPLICANT’S ALLEGATIONS

The applicant alleged that the SOER and his removal from the cutter were caused by a personality conflict between himself and his CO and her antipathy toward him, and not by any negative performance on his part. He alleged that because of the personality conflict, he was denied the right to a fair and impartial evaluation and was suddenly and arbitrarily ordered off the cutter and assigned to TAD at the ISC.

The applicant pointed out that the marks in the SOER are significantly lower than marks he received on other OERs, including some for performance of duty as the Executive Officer of another buoy tender. He argued that the “fact that an OER is materially different from the balance of an officer’s record is a familiar and reliable indicator

³ The applicant did not apply to the Personnel Records Review Board (PRRB), which has a statute of limitations of one year extending from the date that the contested document was or should have been entered in the member’s record.

that factors that have no place in the evaluation process may have crept in." The applicant alleged that his CO "came to have a personal antipathy" for him, which "grew progressively strong from some time during the reporting period covered by the first OER to that covered by the Special OER."

The applicant alleged that on Monday, October 1, 2001, he had a meeting with the CO in which she "told him that he had one month to meet her expectations, that she had already discussed his removal with the District Office, and that if he did not do so, he would be removed." He stated that she instructed him to "(1) not get in arguments with people, (2) do a better job of meeting her deadlines, and (3) work on the cutter support team concept." He stated that late on Friday afternoon, October 5, she further informed him that, in the future, she would lead all department head meetings; that she wanted a list of all required training drills that needed to be done; that priority should go to the cutter support team project; and that "she would sell how that project would work to the department heads." However, on Saturday morning, October 6, the CO called him at home and told him that she knew he was "giving it his all, but that it just wasn't working for her and the ship"; that "he was not representing her the way she wanted to be represented to the crew"; and that he should not come back to the ship but should take a few days to decide where he wanted to go for TAD and call the work life staff if he felt stressed. The applicant alleged that he was very surprised by her sudden decision because he thought he was doing everything she wanted him to do and because she had told him he had a month just six days earlier.

The applicant stated that on October 18, 2001, he received a letter from the CO "purporting to temporarily relieve him for cause." The applicant stated that the letter was improper because the CO did not have authority to relieve him "for cause." The applicant alleged that the similar letter she sent him was disingenuous because she had already signed a draft SOER on November 2, 2001.

The applicant alleged that the SOER that the CO signed on November 2, 2001, was rejected by CGPC in part because she had assigned him the same Comparison Scale mark of 4 that she had assigned him on his previous regular OER, even though SOERs are supposed to be prepared only for performance that is "notably different" from the past. Therefore, she revised the SOER and assigned him a Comparison Scale mark of 3. However, she still recommended that his promotion take place and approved his receipt of a permanent cutterman's pin. The applicant stated that the recommendation for promotion and the cutterman's pin are "consistent with the proposition that she could not work with him any longer" and that the SOER was "calculated to solve a personality conflict rather than destroy his career. If it had been more than that, one would certainly have expected her to disapprove award of his cutterman's pin and seek to block his promotion." He alleged that the SOER may have been generated simply "to support her earlier precipitous attempt to relieve him for cause." The applicant also alleged that the SOER "is laced with unfair or inaccurate, and certainly unobjective comments," and he challenged them individually, as indicated below, beginning on

page 10. The applicant argued that the entire SOER should be removed from his record because its flaws are pervasive and cannot be merely edited or redacted.

The applicant stated that the Reviewer of the SOER was stationed hundreds of miles away and that the comments on the Reviewer's page are therefore merely derivative of what the CO told him. He alleged that he had virtually no contact with the Reviewer, and that it was improper for the Reviewer "to use his portion of the [S]OER as a further opportunity for stating the Reporting Officer's views," especially when one person has acted as both the Supervisor and the Reporting Officer.

The applicant alleged that the Coast Guard violated his right to file a reply to the SOER. He alleged that the text of the reply was the best he could do because the Personnel Manual prohibits discussing "personality conflict or other personal unfairness" in the reply, and the page limitations "preclude[] a meaningful OER reply where there is a great deal that has to be responded to in the OER." The applicant pointed out that he submitted his reply properly through the rating chain and that no member of the chain objected to it. He argued that there was nothing wrong with his reply, given that the page limitation prohibited him from addressing each erroneous comment in the SOER, and that it was wrong for CGPC to reject it based only on an alleged implication. The applicant also argued that, even if the Board does not agree that the SOER is unfair or unobjective, the SOER should be removed because his right to file a meaningful reply has been nullified by CGPC and the restrictions in the Personnel Manual.

With respect to his TAD after removal from the XXX, the applicant alleged that the COER should be modified to appear like a regular OER because he never returned to the XXX, and "it was entirely fictitious to continue to deem him to be assigned to that ship during his work at [the ISC]." The applicant alleged that when he objected to the CO's continuing presence on his rating chain, she initially agreed that an exception could be made, but in the end this was not done and he was given no explanation. He noted that, under Article 10.A.2.g. of the Personnel Manual, an exception to the rating chain may be made in "any ... 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." The applicant argued that, in fairness, the COER should be slightly modified to appear as his regular OER, and the regular OER with all of the performance categories marked "not observed" should be removed from his record.

In support of his allegations, the applicant submitted four affidavits from crewmembers who served on the XXX during all or most of the evaluation period for the SOER. The statements of BOSN2 (the first lieutenant of the XXX), ETC, DC1, and QM2 are integrated with the applicant's allegations about the individual comments in the SOER beginning on page 10.

VIEWS OF THE COAST GUARD

On March 10, 2004, the Judge Advocate General (TJAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request "with the exception of allowing [him] to submit an OER reply in accordance with Coast Guard policy." TJAG based his decision on a memorandum prepared by CGPC.

CGPC alleged that the SOER is not erroneous simply because the marks are lower than those previously received by the applicant. Lower marks may indicate that the Reported-on Officer failed to meet the different challenges presented during the reporting period in accordance with the written performance standards provided on the OER form. CGPC stated that because the applicant has not denied that the CO had been counseling him about his performance for about one year, as her letter of November 9, 2001, indicates, it is fair to conclude that he knew her opinion of his performance and that her actions in October 2001 did not constitute a sudden turn of events.

CGPC stated that it is clear from the record that the XO and the chiefs had arguments that were evident to both the CO and the crew, and the CO determined that they were "less than professional." CGPC stated that "[a]s the Commanding Officer's direct representative and second in command of the unit, the level of professional presence, demeanor and leadership characteristics expected of an Executive Officer by the Service far surpassed the base standards the Commanding Officer demanded from Applicant." CGPC stated that the affiants' statements show that the applicant was not "in step with the CO, chiefs and crew" and that it was the applicant's responsibility to uphold the CO's policies and decisions. CGPC further stated that the record indicates that at the quarterly meetings she held with the ranks, the CO was apparently learning of policies and procedures that she had not ordered and that revoking or reversing them was merely a way to restate her authority to set policy rather than a sign of a personality conflict between her and the applicant.

CGPC pointed out that, although the CO told the applicant on Monday, October 5, 2001, that he would have one month to meet her expectations, the applicant has not denied that something happened during the first week to make her change her mind and decide that she "would not allow him to hold any mtgs w/out me due to his lack of preparation and positive results and inability to present my desires and tone," as stated in the SOER. CGPC stated that although it might have been "more prudent" for the CO to wait the full month, she had "ultimate responsibility for the ship and crew, including their welfare and the workplace climate." CGPC stated that having been given a month, the applicant should have put the CO's "expectations/desires in the forefront and risen to the occasion," but instead "demonstrated in short order that he was not living up to [her] expectations."

CGPC stated that the CO did not have authority to relieve the applicant "for cause" and therefore rescinded her letter and re-sent it under a different heading to explain her action in removing him from the ship. CGPC alleged that its action in

returning the SOER for revision was not unusual as hundreds of OERs are rejected every year, and the Personnel Manual expressly advises commands to consult CGPC when preparing an SOER. It further alleged that awarding the applicant a permanent cutterman's pin, once he had attained five years of sea service, was a matter within the CO's discretion, and her decision to do so is not contrary to anything in the SOER.

CGPC alleged that the applicant's reply to the SOER was properly rejected for the reasons stated in the letter CGPC sent to the applicant on March 26, 2002. However, CGPC recommended that the BCMR allow the applicant to submit a reply that meets the requirements of the Personnel Manual within twenty-one days of its final decision.

CGPC stated that the applicant was not entitled to have his TAD OER (the COER) appear as a regular OER because he was assigned to the ISC on a TAD basis and did not receive permanent change of station (PCS) orders to the ISC. CGPC stated that under the Personnel Manual, an officer's permanent rating chain cannot be altered unless he receives PCS orders or unless a member of the permanent rating chain is disqualified.

CGPC stated that the applicant, in challenging the individual statements in the SOER, has failed to refute them, to explain them, to point out material errors, or to present sufficient evidence to overcome the presumption that his CO accurately and fairly prepared the SOER. CGPC addressed specific comments in the SOER as indicated below, beginning on page 10.

TJAG stated in conclusion that the opinions of the applicant and his affiants were insufficient to prove that the SOER was the product of a personality conflict or to prove that the SOER is not fair and accurate. TJAG stated that the applicant had failed to present evidence proving that the CO misstated a material fact or failed to use her honest professional judgment in assessing his performance.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 11, 2004, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond. The applicant responded on May 7, 2004.

The applicant pointed out that the Coast Guard submitted no witness statements to rebut those he submitted. He repeated some of the arguments made in his application and alleged that having the COER revised to appear as a regular OER was a matter of fairness, even if his particular circumstances were not covered by the Personnel Manual. The applicant also alleged that after he received his first OER from the CO in June 2001, he asked her about the lower marks. However, she would not elaborate and advised him to review the mid period counseling she had given him.

With respect to his last week on the XXX, the applicant alleged that on October 5, 2001, the CO gave him nothing in writing, so he "had to go to her numerous times

every day to obtain feedback” and that she provided “neither praise nor counseling until late Friday afternoon.” The applicant alleged that, although the CO told him on Saturday morning that the District office had told her that he could be removed, this clearly was not the case. He noted that the Reviewer on his rating chain was absent on leave from the District office at this time, which he alleged casts further doubt on his CO’s statement that the District had agreed to his removal.

The applicant also responded to CGPC’s remarks about each of the negative comments in the SOER, as indicated in the section below. In addition, he stated that because the SOER as revised after CGPC’s rejection was worse than the SOER the CO originally prepared, “it is impossible to avoid the inference that the revised version was made harsher not because I deserved a harsher evaluation but rather because a harsher evaluation was necessary in order to achieve her objective of getting rid of me. That it not a proper use of the OES.”

SUMMARIES OF EVIDENCE AND ARGUMENTS ABOUT COMMENTS

The following summaries group (a) the applicant’s evidence and allegations concerning each of the negative comments in the SOER with (b) the affiants’ statements as they pertain to each disputed comment, (c) the Coast Guard’s views concerning each comment, and (d) the applicant’s response, if any, to the views of the Coast Guard. The bold letters and comments correspond to those in the chart of the SOER on page 4.

A. “Lacked ownership & follow up, frequently caught unprepared.”

The applicant argued that the first comment about “lack[ing] ownership” is too vague to respond to.

B. “Realized property lists & inventories had never been established when DX msg arrived. Demanded wall-to-wall inventory during 2-wk drydock in Aug w/out review of Comdt guidance or consideration of officers’ (Os) & chiefs’ (CPOs) input on magnitude of job, best way to manage, and disruption to their worklists on short notice.”

The applicant alleged that he was “ahead of the curve on property accountability and worklists from the beginning.” Although he repeatedly insisted on their preparation, the CO “would not back him up when he sought to establish a list early.” He further alleged that the CO “interfered with the unit’s ability to make progress by granting excessive liberty.”

The ETC alleged that the applicant, as XO, began stressing property issues within a few days of arriving aboard the XXX, but that they were not timely handled because of conflicts between the CO and the applicant. He stated that, when the XXX had a yard period and the inventory finally got underway, it was very difficult because the CO had allowed maximum time off for the crew.

CGPC stated that the SOER “points to more than just one issue regarding property,” but the applicant addressed only the matter of the inventory. Moreover, CGPC stated, liberty “is normally granted by the Commanding Officer at the discretion of the Department Heads for the crew. ... If the [applicant] needed Property Custodians to remain behind at the close of the official workday, he had that authority.” CGPC stated that inventories are usually done during off hours since fewer items will be in use. CGPC alleged that granting leave could in fact facilitate an inventory by getting people out of the way and that the applicant’s explanation and the ETC’s statement do not refute comment B or point out a material error of objective fact.

In response to CGPC, the applicant stated that the CO had told him both prior to their arrival at the XXX’s home port and after September 11, 2001, that the crew should have maximum time off to be with their families.

C. “His poor handling of ship’s finances was a constant frustration for Os and CPOs. He never knew how much money was left, held onto and lost purchase requests (PRs). Realized after end of FY that another \$25K could have been spent, including \$15K of needed deck gear that he approved at last minute without competitive bids, putting SK in untenable spot of making illegal purchase.”

The applicant alleged that the CO knew that monitoring the cutter’s finances was impeded because the cutter often could not connect to the Coast Guard intranet, since it regularly moored at remote locations. He further alleged that “[i]nformation available to the ship’s storekeeper indicated a zero balance before the end of the fiscal year” and because he “had no reason to question” the balance, he made no further expenditures.

CGPC stated that there “are challenges associated with afloat units gaining end of year financial data, yet meticulous tracking of purchases throughout the year, and particularly the last quarter, in between homeport calls, allows units to operate with a certain degree of confidence.” CGPC also noted that the applicant could have recommended leaving a storekeeper behind at home port near the end of the fiscal year, but he apparently failed to take any measures to avoid a serious financial situation or ensure last minute proper purchases.

In response to CGPC, the applicant stated that he had “proceeded on the entirely reasonable basis that the storekeeper, whom the CO had hand-picked for the position, knew her job and that the numbers she provided were accurate” and that he did not leave the storekeeper behind at home port because the CO had “orally promised me that we would have connectivity in the yards.”

D. “Dropped ball on MLCP Compliance Checklists I directed him to base admin pgms for new ship, in spite of written deadline and reminders.”

The applicant alleged that he was “ahead of the curve” on the MLCP Compliance Checklists, as indicated in his previous OER.

CGPC stated that the fact that the applicant may have been “ahead of the curve” on the MLCP Compliance Checklists during the previous evaluation period, as he alleged, does not prove that he did not “drop the ball” during the evaluation period for the SOER. CGPC pointed out that the applicant failed to submit copies of any working documents to disprove comment D.

In response to CGPC, the applicant alleged that because of the CO’s order for maximum liberty, he “could not and did not hold [all departments] to an intermediate deadline” but that he “firmly held them to the Commandant’s directed and required deadline.”

E. “Met with training board to plan trng for upcoming patrol, instead required board mbrs to develop and submit drill scenarios so that he could select ‘grab bag’ style.”

The applicant alleged that he required the training board members to submit “drill scenarios appropriate for their specialized areas” and that there “was no ‘grab bag,’ but simply an assembling of constituent elements of an overall training plan.”

The DC1 stated that, when the XO recommended cross-training the crew, which would require “larger duty sections for a short period of time,” the chiefs petitioned the CO, and the XO’s plan was never enacted.

CGPC pointed out that the applicant did not submit any statements from someone who actually attended the meeting and that the DC1’s comments do not refute the facts in comment E or show that the applicant was “in step with the CO in terms of accomplishing the training function.” CGPC stated that the fact that the CO chose not to accept the applicant’s recommendation on cross-training does not refute comment E.

In response to CGPC, the applicant alleged that, although the CO indicated that she supported cross-training, she refused to support the larger duty sections that would be necessary to facilitate it.

F. “[O]verreacted to possible late marks.”

The applicant alleged that, because he was responsible for the timeliness of many OERs, the dereliction of some of his subordinates in submitting data “required firm action, and was in no way an ‘overreaction.’”

CGPC stated that the applicant’s own opinion that he did not overreact to the situation is not sufficient to refute its content.

G. “[D]id not follow up on assignments, resulting in unnecessary crisis management.”

The applicant alleged that the cutter “had no more crises than any other ship of its class” but that the CO would “occasionally fly off the handle.”

CGPC stated that although it may be hard for the applicant to refute this comment without more specifics, “in the context of the [S]OER it seems to be setting a tone for overall work habits.”

H. “A capable ship handler and coach for conning officers.”

The applicant called this comment “classic damning with faint praise.”

BOSN2 stated that, although he was not on the bridge for about forty of its evolutions while the applicant was XO, he observed them from the forecastle and fantail and the applicant was “a great ship handler [who] never put the ship in danger.”

The DC1 stated that, as conning officer, the applicant “was always concerned with the safe navigation of the ship, which put me (and many of the crew) at ease when transiting in xxxxx waters. His reputation as a safe and prudent ship handler was known throughout the crew.”

The QM2 called the applicant “an excellent ship driver.”

CGPC pointed out that, although the affiants’ statements describe the applicant’s ship-handling skills “in degrees from ‘safe and prudent’ ... to ‘great and excellent,’” they do not mention his ability to coach junior officers. CGPC alleged that the applicant’s and affiants’ opinions of his ship-handling do not refute the comment “or point out a material error of objective fact.”

I. “Often cut people off when they were making a point & provoked disagreements. I counseled him not to argue with CPOs in front of crew. Later, ordered him not to include CPOs at his planning mtgs due to how confrontational they were. Finally, I would not allow him to hold any mtgs w/out me due to his lack of preparation & positive results & inability to present my desires and tone.”

R. “I often had to intervene to diffuse hostilities and refocus the group on the issue.”⁴

The applicant alleged that he did not provoke disagreements. He alleged that the chiefs would circumvent the chain of command and that the CO would side with them. He further alleged that meetings became confrontational because the CO would

⁴ Comments I and R are treated together as they both concern the applicant’s allegedly poor relations with his subordinates.

alter her requirements without notifying him, which undermined his position and made it "impossible to 'present [her] desires and tone.'" He further alleged that "[d]isagreements ... were handled discretely and professionally" and that the CO's "town meeting approach, at which supervisors were undercut, had a serious adverse effect on morale in the wardroom and chiefs' mess."

The ETC stated that he did not witness the applicant arguing with the CPO Mess in front of the crew and that any disagreements between the XO and the chiefs were handled professionally.

The DC1 stated that "it was obvious there was some tension between [the applicant and the CO]." He stated that the applicant's credibility suffered when junior personnel would sidestep the chain of command and get a more favorable response from the CO than they did from the XO. For example, he stated that when the chiefs did not like the XO's training schedule, they got the CO to change it. In addition, he stated that, when the XO recommended cross-training the crew, which would require "larger duty sections for a short period of time," the chiefs petitioned the CO, and the XO's plan was never enacted.

The DC1 stated that the CO held separate quarterly meetings for each rank to discuss concerns. He stated that the meetings became counterproductive because, when the crew complained about how things were run, the CO "would take actions to make them happy even if it meant overruling policy/procedures previously set by their supervisors, including the XO." The DC1 also stated that the applicant's "friendly nature allowed him to bond well with the crew but when a task was at hand he was all business."

CGPC stated that the ETC's and DC1's statements do not disprove the various parts of comments I or R.

In his response to CGPC, the applicant stated that he was professional at all times and that it was the "chiefs who would get upset and want to argue in front of the crew," whereas he would move the conversations to a private place.

J. "Unprepared for budget, trng & property mtgs he called, ended in frustration for attendees due to vague & unrealistic goals he set."

The applicant alleged that this comment simply shows that he had "a different approach" than the CO, though "[b]oth approaches were valid." He alleged that her approach was to micromanage by "particularizing every step along the way" rather than by setting a deadline and "afford[ing] those involved in the process an opportunity to 'buy in' by themselves identifying the intermediate steps towards the ultimate goal," which was his approach.

CGPC stated that the applicant's allegation that he merely had a different management style than the CO and was not unprepared for the meetings is insufficient to refute this comment. CGPC pointed out that the applicant submitted no evidence from the attendees to support his allegation.

K. "Showed up at budget mtg w/ pile of PRs & last known amt of funds, threw PRs on table for attendees to sort/prioritize."

The applicant alleged that he did not throw anything on the table but explained to the attendees that the purchase requests exceeded available funds for the remaining fiscal year and that he needed their help to establish priorities.

CGPC stated that the applicant's own explanation of his actions at this meeting is insufficient to refute this comment. CGPC pointed out that the applicant submitted no evidence from the attendees to support his allegation.

L. "Held last trng board w/out DCA & Trng Officer."

The applicant alleged that when the CO told him to have a training board meeting, he reminded her that the training officer was on leave and could not attend. He further alleged that, on the morning of the meeting, the DCA telephoned to say that he could not arrive in time for the meeting but asked the applicant to conduct it without him since they "had already discussed what was needed for the drill scenarios." He alleged that deferring the meeting would have delayed preparation of drill scenarios and cards for the CO's review.

CGPC stated that if the training officer was actually on leave and the damage control officer was late for work, this should not have been held against the applicant. However, CGPC pointed out that the applicant failed to provide evidence, such as the ship's log, to support his allegations.

In response to CGPC, the applicant alleged that "at smaller units, Officers and Chiefs have 'open gangway' privileges" and that "[n]o log entry is made in those circumstances." He argued that the Coast Guard should be required to produce the logs.

M. "[D]id not follow my direction to have in port drills graded by Damage Control Training Team."

The applicant alleged that he could not use the Damage Control Training Team to grade drills because members of the team were standing normal watch rotations and having them also grade the drills "would have imposed an unusually heavy burden on them." Rather than remove them from the watch rotation, which would have burdened others, he advised the CO that "the drill scenarios were going to be specific enough for the inport OOD or EOW to conduct and grade." He alleged that the CO did not object

to his plan at the time and that it is “profoundly unfair” for her to do so after the fact in the SOER.

CGPC stated that “it is expected and ordinary for the Damage Control Training Team ... to run, grade and debrief drill scenarios,” as the CO directed the applicant to do, despite any burden this may place on the crew, and that such teams “play a critical role in preparing crews to safely and professionally perform ... missions.” CGPC alleged that even if the CO failed to overrule the applicant’s recommendation, which was contrary to her request, the lack of an overt objection “does not mean that she agreed.”

In response to CGPC, the applicant argued that having one person be “pulled out of rotation and required to stay every day after the normal work day would have been extremely unfair” and that the CO did not object to the alternative he proposed.

N. “Failed to meet agreed upon, written deadlines.”

The applicant alleged that the CO “regularly assigned tasks with fixed deadlines for the Department Heads” with “the understanding that the deadlines could be adjusted as long as [the applicant] was kept informed.” His policy was to enforce deadlines for external matters but to allow day-to-day extensions for internal matters based on changes in priorities. He also alleged that the CO would often grant liberty without considering the effect on existing work deadlines.

CGPC alleged that the applicant’s “generalities” about deadline policies are insufficient to refute this comment.

In response to CGPC, the applicant alleged that the CO had orally authorized him to change the deadlines and that it was “unfair for her to fault him on this score.”

O. “As Acting CO in port, failed to weigh-in E-4 before advancing him despite prior reminder. After more prompting from me found member overweight.”

The applicant alleged that this comment constitutes “piling on.” He alleged that the main concern was the petty officer’s drinking problem, not his weight, and that he was only slightly overweight and met the weight limitations soon after his advancement. Moreover, he alleged, he did not disregard a reminder to have the man weighed.

CGPC stated that the applicant’s allegation about the crewmember’s drinking problem does not refute the fact that he failed to require the member to meet the Coast Guard weight standard before advancing him, contrary to regulation, even though he was reminded to do so. CGPC stated that, as the XO, the applicant was responsible for such administrative matters; that intentionally not complying with the regulation is unacceptable; and that his failure to hold the member to the standard set a bad example for the crew.

In response to CGPC, the applicant stated that the member's advancement message was received while they were in the yard after the date of advancement stated in the message. He alleged that although the CO normally presents the member with an advancement certificate, he asked the CO if he could do it himself, and she agreed.

P. "Subverted chain of command by tasking CPOs directly or passing info to E-6s without informing CPOs & dept heads ... Unskilled at leading or being a part of a team."

The applicant alleged that he was proactive and "often interacted with junior personnel when seniors were not physically present," but that he "invariably made certain that the superior[s] were informed as soon as humanly possible." He alleged that the CO did the same and advised her subordinate officers to follow her policy. Moreover, he alleged that, if he had always passed all information via the chain of command, "operations would [have] come to a screeching halt." Furthermore, he alleged that the CO herself frequently circumvented the chain of command by listening to the complaints of the chiefs and by holding separate meetings with junior personnel after which she would overrule their superiors' policies and procedures.

CGPC alleged that the key element of this comment is not that the applicant tasked enlisted members directly, but that he did so without informing their chiefs and department heads. CGPC stated that the applicant's allegation that he always informed the chiefs and department heads "as soon as humanly possible" is insufficient to refute comment P.

In response to CGPC, the applicant stated that, without a specific example of when he is alleged not to have informed the chiefs and department heads about orders he had given their subordinates, it is impossible for him to prove that he did so.

Q. "Asked for input, but always pointed out why those ideas wouldn't work, leading to unproductive discussions."

The applicant stated that the CO had issued a memorandum encouraging her subordinates to ask questions because she did "not want to be surrounded with a bunch of 'yes-men.'" He alleged that her comment that his "articulation of potential problems led to 'unproductive discussions' strongly suggests that her memorandum was not an accurate expression of her true philosophy." He argued that he should not be faulted for expressing alternate views that she had expressly requested.

CGPC stated that this comment does not refer to the CO asking for input, as the applicant indicated, but to the applicant asking for input from his subordinates and responding negatively to it. Therefore, CGPC alleged, the applicant's allegations do not refute the content of comment Q.

In response to CGPC, the applicant stated that, whereas the CO's claims of being open to discussion were a façade, he himself engaged in brainstorming with subordinates, although "[i]n the nature of things, brainstorming may or may not lead to specific changes in direction."

S. "Sent scathing e-mails to Os/CPOs/ESU, never apologized even when demoralizing impact was pointed out. Threatened to 'skin' anyone using YN's absence as excuse for turning in marks late."

The applicant stated that he occasionally needed to be "firm and vivid in drafting email communications," copies of which were ordinarily sent to the CO. He alleged that she never faulted his tone and was merely "piling on" by including this comment in the SOER. He stated that his comment about "skinning" was not "beyond the pale."

CGPC stated that the CO had clearly shown in her July 6, 2000, letter that she expected the applicant to treat his subordinates with respect, which indicates that she did not approve of his scathing and threatening emails. CGPC pointed out that although the applicant alleged that she never faulted him on the tone of these emails, he admitted that they did discuss them, and the SOER indicates that the "demoralizing impact" of such messages was pointed out to him without effect.

In response to CGPC, the applicant alleged that the CO merely concurred that the substance of his emails was correct and never told him that the tone had to change.

T. "Submitted OERs to me 1-2 weeks late."

The applicant alleged that the OERs he prepared for two officers were "a day or so late" and that he was unable to prepare another because he was told he had been removed "for cause."

CGPC alleged that, under the Personnel Manual, Supervisors are required to turn in OERs on time even if the Reported-on Officer fails to submit his or her own input on time. In addition, CGPC stated that the applicant's allegations are insufficient to refute his CO's statement that he submitted evaluations one to two weeks late. CGPC further stated that there is no evidence that the applicant was held accountable for not submitting an OER for the ensign after he was removed from the XXX.

In response to CGPC, the applicant stated that the "CO wanted and expected the members' input on the late OERs" and that he "was respecting her wishes."

U. "[The applicant] has not gained my confidence in his ability to effectively lead and manage the crew because of his abrasive personality & inability to listen to others. Lacks sense of follow through as demonstrated by his financial management of the ship's budget. His operational judgment is impaired by not listening to recommendations of his watch team. I need a backup, an XO who can qualify for com-

mand and act on my direction to bring the Os and CPOs together to achieve the level of performance I demand without using threatening tactics to achieve results."

The applicant stated that the comments in this block are merely restatements of points made elsewhere in the SOER, which he is rebutting.

V. "Did not earn command at sea certification aboard XXX."

The applicant stated that it is a mystery why his CO did not certify him aboard the XXX since she had already certified him aboard the Xxxxxx, as had two prior COs aboard the xxxxxxxx. He pointed out that when she certified him for the Xxxxxx on May 29, 2000, she cited his "seamanship, leadership, personal commitment, and responsibility demonstrated in your outstanding performance."

CGPC stated that the Xxxxxx and the XXX were dramatically different cutters, and so the CO's failure to certify the applicant for command at sea on the XXX does not show that there was a personality conflict between them. CGPC pointed out that the CO's certification for command at sea on the Xxxxxx occurred in July 2000 and that her letter to him dated November 9, 2001, refers to counseling sessions between them beginning in the middle of the previous evaluation period, which would have been about November 2000, soon after they moved to the XXX. CGPC also pointed out that the CO had certified the applicant for command at sea on the Xxxxxx based on his leadership, commitment, and responsibility at the time, and that the SOER documents a "significant decline in performance." Therefore, CGPC alleged, it is clear why the CO withheld command at sea certification on the XXX.

W. "As conn during up bound transit of Xxxxxx River, did not heed nav team input that he was getting more left of track, kept steering courses to the left of base course. Crossed into down bound lane and nearly left channel in front of a vessel he agreed to pass port to port."

The applicant alleged that the affidavit of QM2 M proves that the maneuver "was conducted in an entirely safe and appropriate manner, and any contrary implication is entirely unfounded." He alleged that the evidence in his military record and supporting affidavits "leave[s] no room to question his ability as a conning officer."

BOSN2 stated that, although he was not on the bridge for about forty of its evolutions while the applicant was XO, he observed them from the forecastle and fantail and the applicant was "a great ship handler [who] never put the ship in danger."

The DC1 stated that, as conning officer, the applicant "was always concerned with the safe navigation of the ship, which put me (and many of the crew) at ease when transiting in xxxxxxxx waters. His reputation as a safe and prudent ship handler was known throughout the crew."

The QM2 stated that he was the Junior Officer of the Deck when the XXX made its inbound transit of the Xxxxxx River and was responsible for recording all course changes, communications, and speed changes. He stated that the applicant was the Conning Officer, responsible for navigation and "driving," when they were entering the river and that, upon crossing the river bar, the XXX "started to experience getting set to port" because of the wind and current. He stated that the applicant made a four degree course change to counteract the set, but it was insufficient, and one minute later, the XXX's port main diesel engine "tripped off line" for three minutes. This slowed the cutter's speed, which made it "much harder to steer the ship in the intended direction." Therefore, the applicant made another seven degree course change. However, during the three-minute period that the port engine was off line, the applicant told the Deck Officer to make "a passing arrangement with an approaching vessel" to pass starboard-to-starboard instead of port-to-port. The CO told the applicant that she wanted to pass port-to-port as usual and to get on the correct side of the channel immediately. The applicant explained to her that he could not get the XXX in the correct channel in time and that he, the Deck Officer, and the approaching vessel were comfortable with the arrangement that had been made. After passing starboard-to-starboard, the applicant navigated the XXX back into the right side of the channel. The QM2 stated that, "given the circumstances of that morning, [the applicant] acted appropriately as a Conning Officer and made the most out of a bad situation that unfolded. It is my belief that he was/is an excellent ship driver and he acted in the best interest with regards to the safety of the ship and crew."

The QM2 stated that at a later debriefing with all bridge personnel, the CO questioned the XO's actions. He stated that, although the XO calmly defended his actions, the CO became upset and said that she "wanted an explanation as to why he did not take that action when she requested it." Although the applicant explained, she became "visibly upset" and said that they would discuss it in her quarters. The applicant was "visibly frustrated" but replied affirmatively and they left the bridge.

CGPC stated that although the SOER indicates that the XXX passed the oncoming vessel "port to port," the QM2's statement indicates that the applicant arranged for the vessels to pass starboard side to starboard side, which is not usual. CGPC stated that, whatever passing arrangements were made, the applicant has not refuted comment W. CGPC pointed out that the applicant could have submitted the radio log or navigation log to disprove the various parts of comment W but did not.

In response to CGPC, the applicant stated that "[a]lthough the norm is obviously port to port, starboard to starboard passing in a meeting situation is entirely permissible under the Island Rules." He stated that although his "proposal for an alternative (starboard to starboard) passing was entirely permissible, and the cutter could have reached such an agreement by radiotelephone ... [t]he CO ... vetoed my request to initiate such an agreement." He further alleged that the watch was recording only "steadied on courses [in the logs], not courses ordered."

X. "Advice often shortsighted."

The applicant alleged that it is impossible to respond to this comment without more detail.

CGPC alleged that comment Y provides an example of the short-sighted advice sited in comment X.

Y. "Urged me verbally and by memo to skip Xxx xxxxx and delay homecoming after 4 mos away to get hull repainted, in spite of lack of urgency and negative effect on those waiting for us in Xxxxx, not to mention a contract could not be arranged that fast."

The applicant alleged that this comment is unfair as it was sensible to cancel a "pleasant port call in order to attend to operational needs such as basic hull maintenance." He further alleged that it was unfair of the CO to seek advice and then criticize him in the SOER when she chose to reject it.

CGPC alleged that the Xxx xxxxx is not merely "pleasant port call," as the applicant alleged, but a regional celebration that the Coast Guard was invited to and had agreed to participate in by berthing ships for public tours at the city waterfront. CGPC stated that berthing arrangements were made with the city "well in advance," that the festival is a "tremendous public relations opportunity," and that "[s]imply to not show at the last minute would have been a severe blemish on the Coast Guard." CGPC alleged that it was not unfair for the CO to comment in the SOER on the fact that the applicant provided this bad advice both verbally and in a memorandum.

In response to CGPC, the applicant alleged that the XXX was "experiencing numerous serious problems" prior to the festival, such as the engine tripping off line while entering the Xxxxxx River, but the CO insisted that the XXX attend the festival for "PR" reasons. He stated that his memorandum was his attempt to tell her that he did not understand her decision and to see if she would provide him an explanation in writing. He also alleged that delaying homecoming by two weeks would have been much better than delaying the repairs, which would have required "far more than two weeks' time."

Z. "Quick to give up during challenging buoy positioning and buoy mooring retrieval rather than explore alternatives."

The applicant alleged that the buoy positioning incident was slowed because of a computer malfunction beyond his control and that it was unfair for the CO to criticize him for it. He alleged that the buoy mooring incident occurred after September 11, 2001, when the crew had tried for more than four hours on a dark and rainy night to retrieve the sinker and chain of a mooring buoy to reposition them elsewhere. He alleged that he "commented to [the CO] that the evolution was taking too long and was

becoming dangerous due to crew fatigue” and recommended abandoning them and using contingency spares that were on board. He alleged that, although reasonable efforts are always made to retrieve chains and sinkers, it is sometimes impossible, and the CO “identified no alternatives at the time.”

The ETC stated that, during the XXX’s attempt to move a buoy, the applicant recommended using spares instead of retrieving a chain and sinker because of safety concerns and to avoid wasting man-hours. He stated that, although the chain and sinker were eventually recovered after several hours, the applicant’s advice would have avoided “increasing fatigue.”

CGPC stated that this comment does not fault the applicant for matters that were outside his control but for recommending abandoning buoy positioning and mooring retrieval missions rather than suggesting alternatives to accomplish the missions. CGPC stated that all buoy mooring retrieval missions are dangerous, “especially in the dark and in rain,” but that the missions can be conducted in such conditions. CGPC further stated that retrieving the chain and sinker of a buoy is “extremely prudent” so that they will not become entangled with those of a replacement buoy and that the chain and sinker in question were apparently retrieved without injury or damage. CGPC pointed out that BOSN2, who as the Deck Department Officer “was most likely overseeing buoy deck operations that evening,” did not criticize the CO’s comment in his affidavit for the applicant.

In response to CGPC, the applicant alleged that the buoy positioning was the first that the XXX performed and that, with the computer malfunctioning, there was no alternative since the crew had “last used sextants in July 2000, and then only in the Aleutian Islands, where the Differential Global Positioning System (DGPS) was unavailable. This particular buoy was not worked using sextants.” The applicant also alleged that anyone involved in such work must be mindful of the fact that the Government has previously been “found liable for negligence in maintaining aids to navigation where the result is a grounding or collision.” With regards to the retrieval of the sinker and chain, he argued that the “ship would have dragged the sinker and chain away from the charted location before dropping them,” so snagging was not a concern. He also stated that as this was only the XXX’s “fourth in service buoy to be worked,” the crew was still mastering the new equipment and it was not prudent for them to be “learning” in the dark and rain.

In his response to CGPC, the applicant submitted a statement from LCDR M, the Chief of the Coast Guard’s National Aids to Navigation School. He stated that the primary means of placing buoys is with DGPS, but that GPS is sometimes used when DGPS is unavailable and GPS is deemed to be sufficiently accurate. He stated that other available methods include sextants, gyro bearings, and ranges, but that the school stopped providing instruction on sextants in 1998 because either DGPS or GPS is almost always used. LCDR M also stated that, under COMDTINST M16500.1C, the Automated Aid Positioning System “is the only authorized aids positioning computer program”

and that it must be functioning to position buoys regardless of whether the ship's position is determined by DGPS, GPS, or sextant.

With respect to chain and sinker retrieval, LCDR M stated that the Aids to Navigation Seamanship Manual, COMDTINST M16500.21, does not mention dragging for chains and sinkers that have become detached from a buoy and that they are typically "treated as expendable, and are abandoned in many cases. ... [S]tandard practice ... is to mark the charted location or approximate if it was dragged off location, and arrange for divers to retrieve them later."

APPLICABLE REGULATIONS

Authority and Relations of the CO and XO of a Ship

Article 4.F.1.a. of the Personnel Manual defines "relief for cause" as "the administrative removal of a commanding officer (CO) or officer in charge (OIC) from his or her current duty assignment before the planned rotation date" and states that it normally consists of the CO's or OIC's temporary removal by a flag officer and permanent removal by the Commandant. The term "relief for cause" is not applied to the removal of an XO.

Chapter 4-1-2.A. of Coast Guard Regulations (M5000.3B) provides that "[t]he responsibility of the commanding officer for that command is absolute At the commanding officer's discretion, portions of that authority may be delegated to subordinates for the execution of details, but such delegation of authority shall in no way relieve the commanding officer of continued responsibility for the safety, efficiency, and well-being of the command." Chapter 5-1-2.A. states that "[a]n officer detailed to command by competent authority has authority over all officers or other persons attached to the command." Chapter 7-5-1.B. provides that "[w]hen circumstances require, the commanding officer may assign a commissioned or warrant officer to duty other than the type specified in the orders assigning the officer to the unit."

Chapter 4-1-15 of the Regulations states that, as part of her responsibility for the well-being of the crew, a CO "shall ... [w]ithin the limits of the command authority, grant the maximum amount of leave and liberty consistent with good administration and efficiency."

Chapter 4-1-5.A. of the Regulations states that "[t]he commanding officer shall normally issue all orders relative to the duties of the command and the administration of personnel through the executive officer, and shall keep the latter informed of all policies." Chapter 4-2-15.A. provides that the CO "shall as often as possible entrust the handling of the vessel during important evolutions to the executive officer"

Chapter 6-2-1.A. of the Regulations states that "[t]he executive officer is the direct representative of the commanding officer. All orders issued by the executive officer

shall have the same force and effect as though issued by the commanding officer and shall be obeyed accordingly by all persons on board. In performance of these duties, the executive officer shall conform to and effect the policies and orders of the commanding officer and shall keep informed of all significant matters pertaining to the command. The executive officer shall be primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command. While recognizing the right and duty of heads of departments and other officers to confer directly with the commanding officer on important matters relating to their duties, the executive officer must be responsible for keeping appropriately informed of such matters.”

Chapter 6-2-3.A. of the Regulations provides that the specific duties of the XO include supervising the administration of the business of the ship; performing the functions of the personnel officer of the unit; preparing and maintaining bills and orders for the organization; supervising and coordinating work, exercises, and training; supervising and coordinating the procurement of supplies; preparing and promulgating work schedules; inspecting departments; functioning as safety officer; and endeavoring to maintain high morale.

Rating Chain Regulations

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. provides that “Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command.” Every officer normally has a “rating chain” of three senior personnel, including a Supervisor, the Reporting Officer, and the Reviewer. However, a “commanding officer will normally be both Reporting Officer and Supervisor for the executive officer, but only Reporting Officer for the department heads.” Personnel Manual, Article 10.A.2.e.1.e.

Under Article 10.A.2.g.2.b., a CO may be disqualified from serving on a subordinate’s rating chain if the CO has been “relie[ved] for cause due to misconduct or unsatisfactory performance, [is] an interested party to an investigation or court of inquiry, or [in] 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.A.2.d.2.i. states that it is the responsibility of the Supervisor to “[i]nitiate[] an OER if the Reported-on Officer is unavailable, unable, or unwilling to perform in a timely manner” and that the OER should be forwarded to the Reporting Officer “not later than 10 days after the end of the reporting period.”

Article 10.A.2.f.2. provides that it is the responsibility of the Reviewer to “[e]nsure[] the OER reflects a reasonably consistent picture of the Reported-on Officer’s performance and potential” and to “[a]dd[] comments as necessary ... that further address the performance and/or potential of the Reported-on Officer.”

Article 10.A.1.b.2. states that “[i]ndividual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards.”

Instructions for Preparing an OER

Article 10.A.4.c.4. instructs Supervisors to assign marks and write comments for the first thirteen performance categories on an OER as follows (nearly identical instructions appear in Article 10.A.4.c.7. for Reporting Officers, who complete the rest of the OER):

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

• • •

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

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct 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. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

Article 10.A.4.c.8.a. instructs the Reporting Officer to complete the Comparison Scale on an OER by filling in the circle that most accurately reflects his or her ranking of the Reported-on Officer in comparison to all other officers of the same grade whom the Reporting Officer has known.

Article 10.A.4.f. prohibits a rating chain member from mentioning “performance or conduct which occurred outside the reporting period.”

Under Articles 10.A.2.h. and i., either the OER Administrator or CGPC may, upon reviewing an evaluation forwarded by the Reviewer, return it to the rating chain for correction or redaction.

Instructions Regarding Exception OERs

Article 10.A.3.c.1 of the Personnel Manual provides the following with respect to special OERs:

The Commandant, commanding officers, higher authority within the chain of command and Reporting Officers may direct these reports. The circumstances for the Special OER must relate to one of the situations described in subsections a. through e. ... Special OERs present unique preparation problems for members of the rating chain. Therefore, preparers are strongly encouraged to contact Commander, (CGPC-rpm) or Commander (CGPC-opm-3) for guidance prior to submitting these exception reports.

a. A special OER may be completed to document performance notably different from the previous reporting period, if deferring the report of performance until the next regular report would preclude documentation to support adequate personnel management decisions, such as selection or reassignment. This report should not normally reflect performance that is reportable under Article 10.A.3.c.1.b. Notably changed performance is that which results in marks and comments substantially different from the previous reporting period and results in a change in the Section 9 comparison or rating scale. This OER counts for continuity.

Article 10.A.3.c.2. of the Personnel Manual provides the following with respect to concurrent OERs:

A concurrent OER is an OER submitted in addition to a regular or special OER. The permanent unit's OER is never considered a concurrent report and should not be so identified. A concurrent report is always in addition to a regular or special OER, and thus does not count for continuity. The unit to which the Reported-on Officer is permanently attached is always responsible for ensuring that continuity is maintained with either regular or special OERs. Concurrent reports may be submitted only when the officer is:
...

e. Performing temporary assigned duty (TAD) away from a permanent station for a period of at least 60 consecutive days while being observed by a senior other than the regular Reporting Officer, e.g., senior aviator deployed aboard a Coast Guard icebreaker. In this case, the concurrent report normally will be written upon the detachment of the TAD officer and cover only the period of temporary additional duty.

Replies to OERs

Articles 10.A.4.g.1. and 2. of the Personnel Manual provide that a "Reported-on Officer may reply to any OER regardless of its content and have this reply filed with the OER. Replies provide an opportunity for the Reported-on Officer to express a view of performance which may differ from that of a rating official. ... Comments should be performance-oriented, either addressing performance not contained in the OER or amplifying the reported performance. Restrictions outlined in Article 10.A.4.f. apply. Comments pertaining strictly to interpersonal relations or a personal opinion of the abilities or qualities of a rating chain member are not permitted." Article 10.A.4.g.4. requires that such replies be submitted within 14 days of the day the Reported-on Officer receives an official copy of the OER from CGPC, and Article 10.A.4.g.9. states that

“Reported-on Officers shall limit their replies to a maximum of two single-spaced pages (8 1/2” x 11”) typed on one side with no enclosures.”

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. The applicant failed to file an application with the Personnel Records Review Board during the year following his receipt of the SOER, although he was clearly aware of that board's jurisdiction over his case at the time. Nevertheless, since the PRRB no longer has jurisdiction over his case, he is deemed to have exhausted his administrative remedies. The application was timely.

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

3. Absent specific evidence to the contrary, the Board presumes that an applicant's rating officials acted correctly, lawfully, and in good faith in making their evaluations.⁵ Once an applicant has rebutted the presumption of regularity by presenting at least some evidence that “specifically and convincingly contradicts his rating officials' marks and comments,”⁶ the Board weighs the evidence in the record to determine whether the applicant has met his burden of proof—the preponderance of the evidence—with respect to the challenged OER.⁷ The Board determines whether the applicant has proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁸

4. The affidavits of crewmembers submitted by the applicant indicate that his ship-handling skills and relations with subordinates were much better than indicated by the SOER. Therefore the presumption of regularity with respect to the SOER is overcome, and the Board will weigh the evidence of record. In weighing the evidence, the Board bears in mind that the SOER was prepared and signed by the applicant's CO, who was officially responsible for observing and evaluating his performance, who was herself to be evaluated based on her leadership and evaluation of the applicant, and

⁵ 33 C.F.R. § 52.24(b); *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ Final Decision, BCMR Docket No. 2000-194.

⁷ 33 C.F.R. § 52.24(b). In determining the preponderance of the evidence, the Board continues to consider the evidentiary weight of the rating chain's assessment even though the presumption of regularity has been rebutted. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 n.10 (1981).

⁸ *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980); CGBCMR Docket No. 86-96.

who was in the best position to know whether the applicant was fulfilling her stated expectations and implementing her policies on the XXX. In addition, the Board notes that, without the cooperation of many of his subordinates on the XXX, it is difficult if not impossible for the applicant to disprove many of the negative comments in the SOER. However, the difficulty of gathering evidence does not relieve the applicant of the burden of proving by a preponderance of the evidence that the challenged comments are erroneous or unfair. With this in mind, the Board has carefully considered all of the evidence regarding the disputed SOER and draws the following conclusions with respect to the evidence.

5. Comment A. "Lacked ownership & follow up, frequently caught unprepared."

Although the applicant complained that this comment was too vague to respond to, the Board finds that it is amply supported by the details in comments B, C, and D.

6. Comment B. "Realized property lists & inventories had never been established when DX msg arrived. Demanded wall-to-wall inventory during 2-wk drydock in Aug w/out review of Comdt guidance or consideration of officers' (Os) & chiefs' (CPOs) input on magnitude of job, best way to manage, and disruption to their worklists on short notice."

Although the applicant and the ETC alleged that the applicant was proactive in matters of property and inventory, the Board is not persuaded that comment B is erroneous. The applicant has not proved that he was unable to ensure that the work was done earlier, as the CO apparently expected, and he has not proved that he timely sought and considered input from the department heads about the best way and time to complete the work.

7. Comment C. "His poor handling of ship's finances was a constant frustration for Os and CPOs. He never knew how much money was left, held onto and lost purchase requests (PRs). Realized after end of FY that another \$25K could have been spent, including \$15K of needed deck gear that he approved at last minute without competitive bids, putting SK in untenable spot of making illegal purchase."

The applicant's statements about the frequent lack of an intranet connection and the storekeeper's balance sheet do not persuade the Board that he could not have done a better job at keeping track of available funds and purchase requests in accordance with the CO's and crew's expectations. He has not proved that any part of comment C is erroneous.

8. Comment D. "Dropped ball on MLCP Compliance Checklists I directed him to base admin pgms for new ship, in spite of written deadline and reminders."

The applicant's allegations that he did not "drop the ball" on these checklists and was obstructed by the CO's granting of leave are insufficient to prove that comment D is false.

9. Comment E. "Met with training board to plan trng for upcoming patrol, instead required board mbrs to develop and submit drill scenarios so that he could select 'grab bag' style."

The applicant's allegations that there "was no 'grab bag,' but simply an assembling of constituent elements of an overall training plan" and that the CO refused to support the larger duty sections that would be necessary to facilitate cross-training the crew do not prove that this comment by his CO is erroneous.

10. Comment F. "[O]verreacted to possible late marks."

The Board agrees with the Coast Guard that the applicant's own opinion that he did not overreact to the situation is not sufficient to prove that this comment is erroneous.

11. Comment G. "[D]id not follow up on assignments, resulting in unnecessary crisis management."

The applicant's allegation that the cutter "had no more crises than any other ship of its class" does not convince the Board that the CO erred in stating that he failed to follow up on assignments and therefore was personally responsible for some "unnecessary crisis management."

12. Comment H. "A capable ship handler and coach for conning officers."

The applicant, the BOSN2, the DC1, and the QM2 all indicated that his ship-handling skills were better than "capable." In addition, the CO apparently decided that his skills were sufficient for receipt of a permanent cutterman's pin. However, in light of comment W, it is clear that the CO personally had some concern about his ship handling and decision-making and, perhaps, the example he set for other Conning Officers. Whether the applicant's ship handling was "capable," "safe and prudent," "great," or "excellent" (as variously described by the CO and affiants) is a judgment call, and he has not proved by a preponderance of the evidence that his CO did not exercise her best professional judgment in using the word "capable" in the SOER even if comment W is incomplete (see below) and even if his ship-handling skills and decision-making on the bridge were usually better than "capable."

13. Comments I & R. "Often cut people off when they were making a point & provoked disagreements. I counseled him not to argue with CPOs in front of crew. Later, ordered him not to include CPOs at his planning mtgs due to how confrontational they were. Finally, I would not allow him to hold any mtgs w/out me due to his

lack of preparation & positive results & inability to present my desires and tone.” & “I often had to intervene to diffuse hostilities and refocus the group on the issue.”

The applicant’s allegations and those of the ETC and the DC1 do not persuade the Board that either comment is erroneous. The affidavits support the CO’s assertion that the applicant and the chiefs had frequent acrimonious disagreements. The CO was in the best position to know the applicant’s dealings with the chiefs and what steps she had to take because of his leadership deficiencies. Although the applicant and the DC1 blame the CO for listening to the chiefs’ and crew’s complaints and “siding” with them, the applicant has not convinced the Board that the CO’s actions caused the conflict between him and his subordinates or that any part of comment I or R is erroneous.

14. Comment J. “Unprepared for budget, trng & property mtgs he called, ended in frustration for attendees due to vague & unrealistic goals he set.”

If the applicant’s management style did not satisfy the CO, as he alleged, he was responsible for altering it to meet her expectations. Moreover, having a different management style does not justify being unprepared for meetings or setting vague or unrealistic goals. The applicant has not proved that comment J is erroneous.

15. Comment K. “Showed up at budget mtg w/ pile of PRs & last known amt of funds, threw PRs on table for attendees to sort/prioritize.”

The Board agrees with the Coast Guard that the applicant’s own explanation of his actions at this meeting is insufficient to prove that it mischaracterizes his actions. He has not submitted any statement from an attendee to refute this comment.

16. Comment L. “Held last trng board w/out DCA & Trng Officer.”

The applicant alleged that when the CO told him to have a training board meeting, he reminded her that the training officer was on leave, and that, on the morning of the meeting, the DCA telephoned to say that he would arrive late and that the applicant should conduct the meeting without him since they “had already discussed what was needed for the drill scenarios.” He provided no proof of these allegations and argued that the Coast Guard should be required to produce the logs. Because of the alleged “open gangway privilege,” it is not clear that what if anything the logs would prove. Moreover, the applicant bears the burden of proving his case by a preponderance of the evidence, and he cannot shift that burden to the Coast Guard even with evidence, much less with a mere allegation.⁹ The applicant’s allegations do not prove that this comment by his CO is erroneous or unfair.

17. Comment M. “[D]id not follow my direction to have in port drills graded by Damage Control Training Team.”

⁹ See the Decision of the delegate of the Secretary in BCMR Docket No. 2000-037.

Every Coast Guard cutter in service conducts training, and it is apparently normal practice to have such teams grade drills. The applicant's allegation that the CO allowed the applicant to exercise his own judgment, contrary to her initial request, does not persuade the Board that it was "profoundly unfair" of her to criticize his decision-making in this regard, as the applicant alleged. His allegations about the unfair burden following normal practice would have placed on the team or the crew do not prove that comment M is erroneous or unfair.

18. Comment N. "Failed to meet agreed upon, written deadlines."

The Board agrees with the Coast Guard that the applicant's general allegations about deadline policies on the XXX are insufficient to prove that this comment by his CO is erroneous or unjust.

19. Comment O. "As Acting CO in port, failed to weigh-in E-4 before advancing him despite prior reminder. After more prompting from me found member overweight."

The applicant stated that the CO authorized him to present the advancement certificate himself, but he did not deny that he failed to have the member weighed despite the requirement in the Personnel Manual, and the CO stated that he was specifically reminded to do so. He has not proved to the Board that comment O is erroneous or unjust.

20. Comment P. "Subverted chain of command by tasking CPOs directly or passing info to E-6s without informing CPOs & dept heads ... Unskilled at leading or being a part of a team."

The applicant alleged that he always informed crewmembers' supervisors of his orders to their subordinates "as soon as humanly possible." He also alleged that without a specific example of when he is alleged not to have informed the chiefs and department heads about orders he had given their subordinates, it is impossible for him to prove that he did so. However, the applicant could have submitted affidavits from the junior officers and chiefs in support of his allegation that he habitually and promptly informed them after tasking their subordinates. He has not persuaded the Board that comment P is erroneous or unjust.

21. Comment Q. "Asked for input, but always pointed out why those ideas wouldn't work, leading to unproductive discussions."

The Board agrees with CGPC that, in the context of the SOER, this comment refers to the applicant's own requests for input and reactions thereto. The applicant's opinion that his responses to input were constructive and appropriate do not prove that this comment by his CO is erroneous or unjust.

22. Comment S. "Sent scathing e-mails to Os/CPOs/ESU, never apologized even when demoralizing impact was pointed out. Threatened to 'skin' anyone using YN's absence as excuse for turning in marks late."

The applicant alleged that, contrary to comment S, his emails were merely "firm and vivid" and that the CO never objected to his tone, even though comment S indicates that the "demoralizing impact was pointed out." The applicant's allegations are insufficient to prove that this comment by his CO is erroneous or unjust.

23. Comment T. "Submitted OERs to me 1-2 weeks late."

Every member of a rating chain is responsible for submitting OERs on time. The applicant's allegations about the timing of the OERs and the reasons for their untimeliness do not prove that comment T is erroneous or unjust.

24. Comment U. "[The applicant] has not gained my confidence in his ability to effectively lead and manage the crew because of his abrasive personality & inability to listen to others. Lacks sense of follow through as demonstrated by his financial management of the ship's budget. His operational judgment is impaired by not listening to recommendations of his watch team. I need a backup, an XO who can qualify for command and act on my direction to bring the Os and CPOs together to achieve the level of performance I demand without using threatening tactics to achieve results."

The applicant has not proved that anything in this comment is erroneous or unfair.

25. Comment V. "Did not earn command at sea certification aboard XXX."

The Board agrees with the Coast Guard that, in light of the CO's obvious concerns about the applicant's leadership, seamanship, and acrimonious relations with the crew, it is not surprising that she did not certify him for command at sea aboard the XXX. The applicant has not proved that this comment is erroneous or unfair.

26. Comment W. "As conn during up bound transit of Xxxxxx River, did not heed nav team input that he was getting more left of track, kept steering courses to the left of base course. Crossed into down bound lane and nearly left channel in front of a vessel he agreed to pass port to port."

The QM2, who was on the bridge during the transit, stated that the applicant was confronted with a strong wind and current that set the ship to port and one engine that "tripped off line" for three minutes. He stated that the applicant acted appropriately by correcting the XXX's course twice. In addition, the QM2 stated that the applicant made timely arrangements with the oncoming vessel to pass it safely. The CO omitted these mitigating facts from her description of the incident in Comment W, and as a result it

reflects much more poorly on his performance than it would have had the mitigating facts about the current, the engine, and the arrangements been included. Although space for comments on the OER form is limited, the Board finds that the CO's omission of these significantly mitigating facts was unfair to the applicant because the omissions leave an incomplete description of—and therefore create an inaccurate impression of—the circumstances of the transit and his response and performance. The Board finds that because of the significant omissions of fact, the description of the applicant's performance in comment W is erroneous, and it should be removed from the SOER. The performance marks in block 8 of the SOER are adequately supported by the remaining comments in this block.

27. Comment X. "Advice often shortsighted."

The applicant complained that it is impossible to respond to this comment without more detail. However, the Board finds that comment X is adequately supported by the detailed examples of his advice that the CO provided in comments Y and Z.

28. Comment Y. "Urged me verbally and by memo to skip Xxx xxxxx and delay homecoming after 4 mos away to get hull repainted, in spite of lack of urgency and negative effect on those waiting for us in Xxxxx, not to mention a contract could not be arranged that fast."

The applicant apparently strongly disagrees with the CO's determination that it was very important for the XXX to meet its commitment to be present at the festival. However, he has submitted nothing to prove that any part of the comment is erroneous or unfair. His allegation that repairs would have been quicker if the XXX had skipped the festival do not persuade the Board that the CO was unjust in using this incident as an example of the short-sighted advice she complained of in comment X.

29. Comment Z. "Quick to give up during challenging buoy positioning and buoy mooring retrieval rather than explore alternatives."

The applicant has not proved that the evolutions referred to in comment Z are those that he has described in his application. However, assuming they are, the only points of contention seem to be whether he was "quick" to give up (as he did not deny that he recommended on those two occasions that the crew give up their efforts) given the circumstances, and whether he failed to explore alternatives before making these recommendations.

Regarding the buoy placement, the applicant seems to allege that, without the computer, giving up was the only reasonable option and that there were no real alternatives to explore. He submitted a statement from LCDR M that strongly supports his allegation. However, LCDR M was not on the XXX and was not privy to every circumstance and conversation during the evolution, as was the CO. Regarding the retrieval of the chain and sinker, the ETC's statement supports that of the applicant that the effort

took more than four hours and that giving up would have avoided fatiguing the crew, which is a safety concern. The ETC's statement implies that he thought that the applicant was not too quick to recommend giving up, but it is not clear that the ETC was in a position to know exactly when the applicant first recommended giving up to the CO. LCDR M stated that chains and sinkers are "treated as expendable, and are abandoned in many cases. ... [S]tandard practice ... is to mark the charted location or approximate if it was dragged off location, and arrange for divers to retrieve them later." Despite these affidavits, the Board is not persuaded that it was necessarily safer or more efficient for the XXX to abandon the chain and sinker in order to save a few hours and thereby require a second mission with divers to retrieve them. While it clearly would have been safer and more convenient for the crew of the XXX to abandon the effort, the applicant has not proved that his recommendation was best for the Coast Guard in terms of overall safety and efficiency. The CO was best positioned to judge the circumstances and the applicant's reactions to them, and the applicant has not proved that she erred in doing so. He has not proved that comment Z is erroneous or unfair as an example of the short-sighted advice the CO complained of in comment X.

30. The applicant alleged that the SOER is a product of a personality conflict between himself and the CO and her antipathy for him. However, he has not proved by a preponderance of the evidence that the comments in the SOER are erroneous, with the exception of comment W, which is erroneous only because of omissions of mitigating facts. Although the affiants indicated that there was tension between the CO and the applicant, the Board is not persuaded that it was caused by a personality conflict or antipathy rather than by the performance failures documented in the SOER. The applicant cited the award of the cutterman's pin, the recommendations for promotion, and the fact that the first draft of the SOER was better than the final version as evidence of the personality conflict. However, this evidence actually suggests, if anything, that the CO had no personal animus against the applicant and that her actions and comments were caused by his performance and not by any bias on her part. The Board finds that the preponderance of the evidence in the record indicates that the CO's actions in ordering him off the ship and preparing the letter and the SOER resulted from the applicant's performance deficiencies rather than from a personality conflict. Under Article 10.A.3.c.1 of the Personnel Manual, it was proper for her to prepare the SOER to document the significant decline in the applicant's performance. The applicant has not proved that his CO should have been "disqualified" from serving on his rating chain, pursuant to Article 10.A.2.g.2.b. of the Personnel Manual, either for the SOER or for the subsequent regular OER.

31. The applicant alleged that it was unfair for the Reviewer to add a page of comments to the SOER because he had little contact with the applicant. Under Article 10.A.2.f.2.b. of the Personnel Manual, the Reviewer was authorized to add a page of comments to the SOER to provide his own observations and to address the applicant's potential for further service. Most of the Reviewer's comments address the effect the applicant's deficiencies had on the CO's ability to trust and rely on him, her attempts to counsel him, and his potential. Although the Reviewer apparently learned of the appli-

cant's deficiencies and the counseling second-hand and most of the Reviewer's comments support the CO's comments in the SOER, nothing he wrote is obviously redundant (or "piling on"), and every comment is a conclusion that he could reasonably draw by himself from the CO's reports over the course of the evaluation period. The applicant has not proved that the Reviewer's page is erroneous or unfair.

32. The applicant alleged that it was unfair for the CO to lower certain marks, including the Comparison Scale mark, after CGPC returned it. However, under Articles 10.A.2.h. and i. of the Personnel Manual, either the OER Administrator or CGPC may, upon reviewing an evaluation forwarded by the Reviewer, return it to the rating chain for correction or redaction. Although the CO lowered some marks and revised a few comments in the SOER after CGPC rejected her first draft, the applicant has not shown that the SOER is inaccurate or unfair because of the revision.

33. The applicant has not proved by a preponderance of the evidence that any mark or comment in the SOER is erroneous or unfair. The affidavits he has submitted, although they support a few of his allegations in certain respects, are insufficient to prove that the CO failed to assess his performance accurately and fairly and to document it accurately and fairly in the SOER. Gathering evidence sufficient to disprove certain comments by the CO in the SOER might be difficult or even impossible without great effort by the applicant and tremendous cooperation on the part of his subordinates on the XXX, but as stated in finding 4, the difficulty of gathering evidence does not relieve the applicant of the burden of producing it and of proving by a preponderance of the evidence that his CO's comments in the SOER are erroneous or unfair.

34. The CO was not authorized to remove the applicant "for cause" because, under Article 4.F.1.a. of the Personnel Manual, "relief for cause" is a term of art used only for removing commanding officers (or officers in charge) from their positions, and the action must be initiated by a flag officer and approved by the Commandant. However, as captain of the XXX, with absolute responsibility for its crew and operations, she was authorized to order any member of her crew from the ship if she found his presence to be disruptive and to order him to stay off until he received further orders, such as a TAD assignment or PCS orders. *See* M5000.3B, paragraphs 4-1-2, 5-1-2, and 7-5-1.B. The applicant alleged that his CO initially told him that he had a month to meet her expectations, but he has not proved that he was sufficiently successful at avoiding conflict and representing her policies to the crew during the first week of the probationary period to render her decision to send him away before the month was over unfair. Nor has he proved that the District Commander did not approve of her actions. Moreover, the record indicates that the applicant had received significant counseling about the CO's dissatisfaction with his performance during the year prior to his removal.

35. The applicant alleged that the Coast Guard has denied him the right to reply to the SOER by prohibiting comments he wants to include and having a page limitation. Article 10.A.4.g. requires comments in replies to be strictly related to the

performance of the Reported-on Officer, and the applicant has not persuaded the Board that this restriction is unfair or that he should be allowed to say anything he wants in the reply. Likewise, given the strict limitation on the length of comments on the OER form, the Board finds that it is not unreasonable for replies to be similarly limited in length, even if it prohibits the applicant from going into as much detail as he would like. The applicant alleged that the reply he submitted should not have been rejected by CGPC because he stated only that “[g]iven the time, length and content limits set by [the Personnel Manual], I am compelled to limit this reply to a request that readers of this OER consider it in light of my other OERs and my entire [personal data record].” This sentence is not performance-related and does not address or amplify any mark or comment in the SOER, as required under Article 10.A.4.g.2. The Board finds that the Coast Guard has not erred in rejecting the applicant’s reply to the SOER as it does not meet the requirements of the Personnel Manual. Moreover, the remark is obviously addressed to promotion board members and, as such, belongs in the separate, direct communication that the applicant is entitled to provide to each promotion board.

36. The applicant alleged that it was unfair for his TAD assignment from October 9, 2001, to May 15, 2002, to be documented by a substantive COER and a regular OER from his permanent command without marks or comments. Under Article 10.A.3.c.2.e. of the Personnel Manual, a COER should be prepared when the officer is “[p]erforming temporary assigned duty (TAD) away from a permanent station for a period of at least 60 consecutive days while being observed by a senior other than the regular Reporting Officer.” Therefore, the COER was prepared in accordance with regulation and, because COERs do not count for continuity, the applicant’s permanent rating chain was required to prepare a regular OER for him with no comments or marks (much like the OERs he and other officers receive during graduate school) since he was away from the XXX for the entire period. Although the regular OER contains no substantive marks or comments, the applicant may believe that it draws attention to the fact that he was removed from the ship. However, the COER and regular OER are the correct administrative consequences, under the Personnel Manual, of the applicant’s removal from the ship, and he has not proved that the CO acted unfairly in removing him from the ship, even though she initially used the phrase “for cause,” which is not applicable to the removal of XOs. The Board is not convinced that the SOER or his removal from the ship will receive undue attention merely because the following seven months of his performance are documented by a substantive COER from the ISC and a non-substantive regular OER, in lieu of one short-term regular OER.

37. In objecting to CGPC’s rejection of his reply to the SOER on March 26, 2002, the applicant asked that the time for his right to reply be extended until he had had an opportunity to seek relief from the PRRB or BCMR, and his request was granted. The Board finds that CGPC’s promise in this regard should be honored. Although the Coast Guard recommended, for reasons not apparent in the record, that the applicant be given 21 days from the date of this decision to complete his reply to the SOER, the Board finds that since the applicant may have leave scheduled or interfering responsi-

bilities, he should have 30 days from the date of this decision to submit a reply to the SOER that conforms to the requirements of Article 10.A.4.g. of the Personnel Manual.

38. The applicant made numerous allegations with respect to the actions and attitude of his CO and other Coast Guard personnel. Those allegations not specifically addressed above are considered to be without merit and/or not dispositive of the case.

39. Accordingly, the applicant's requests with respect to the removal of the SOER and regular OER and the alteration of the COER should be denied, but comment W should be removed from the SOER, and he should have the right to submit a reply to the SOER, which conforms to the requirements of Article 10.A.4.g. of the Personnel Manual, within 30 days of the date of this decision.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is granted in part as follows:

(a) The following sentences shall be removed from block 8 of the special officer evaluation report in his record for the period from June 1, 2001, to October 8, 2001: "As conn during up bound transit of Xxxxxx River, did not heed nav team input that he was getting more left of track, kept steering courses to the left of base course. Crossed into down bound lane and nearly left channel in front of a vessel he agreed to pass port to port."

(b) He shall have the right to submit a reply that conforms to the requirements of Article 10.A.4.g. of the Personnel Manual in response to the special officer evaluation report in his record for the period from June 1, 2001, to October 8, 2001, within 30 days of the date of this decision.

All other relief is denied

Quang D. Nguyen

Darren S. Wall

Eric J. Young