

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-159

Xxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxx

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on July 30, 2004, upon receipt of the applicant's completed application.

This final decision, dated March 31, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, who at the time of application was a lieutenant (LT) in the Reserve serving on extended active duty,¹ asked the Board to correct his record by removing an officer evaluation report (OER) covering his service from August 1, 1998, to July 31, 2000. He asked that a substitute OER be prepared by the same reporting officer and reviewer but by a different supervisor. He alleged that the supervisor who prepared the disputed OER was biased against him because the applicant had "effectively put him 'on report,'" and therefore should not have been on the applicant's rating chain.

The applicant asked the Board to remove any failure of selection by the lieutenant commander (LCDR) selection board in August 2004 from his record if he fails of selection while his case is pending before the BCMR.² He also asked the Board to back date his date of rank to LCDR if he is selected for promotion by the first selection board to review his record after it is corrected and to award him backpay and allowances.

¹ The applicant has since returned to inactive duty.

² The applicant did fail of selection in August 2004.

APPLICANT'S ALLEGATIONS

The applicant alleged that as a reservist on inactive duty from 1998 to 2000, he was assigned to the planning office for the xxxxxxxxxxxxxxxx Regatta (XXXX). The planning office was part of the Waterways Management Section of the Marine Safety Office (MSO) in XXXXX, to which the applicant was assigned. However, the senior officer in the planning office was CDR C, a reservist assigned to Group XXXXX, rather than the MSO itself. A chief yeoman (YNC) and a quartermaster second class (QM2) from Group XXXXX were the other two members of the planning office.

The applicant stated that, originally, his rating chain at the MSO included LCDR B, the Chief of Port Operations, as supervisor; CDR S, the MSO Executive Officer (XO), as reporting officer; and CAPT W, the Commanding Officer (CO) and Captain of the Port, as reviewer. However, on December 15, 1999, about three-fourths of the way through the two-year evaluation period for the disputed OER, his rating chain was modified by substituting CDR C, the ranking member of the planning office, as his supervisor instead of LCDR B. He was told that the change was made "to improve teamwork and to create a clearer reporting chain" in the planning office. The applicant alleged that CDR C's own rating chain was also altered to include the MSO XO as supervisor, the CO as reporting officer, and CAPT G, the District Chief of Marine Safety, as reviewer.

The applicant alleged that he immediately objected to the modification of his rating chain because just one week before, he had reported serious violations by CDR C. He had reported overhearing CDR C (their desks were adjacent) inviting a civilian, Mr. X, to stop by with an application for a marine event on a date for which they already had another, competing application. The applicant had reported that he heard CDR C, who had authority to approve either application, say, "We already have an application for that date, but if you want to stop by with your material, we can take a look at it, ... [a]nd you might want to bring something to sweeten the pot." On December 8, 2000, as the applicant was leaving the office for a meeting, he saw Mr. X come in with his application and an envelope for CDR C, who instead of taking it, asked Mr. X to hand it to the chief yeoman. The applicant stated that when he returned to the office, the chief yeoman was distributing tickets to a xxxx xxxxxxxx game that evening. He alleged that when she handed him a ticket, "he asked where they came from. She said, "Don't ask and you don't have to know." The applicant alleged that he looked at CDR C, who merely shrugged his shoulders and said, "I have no idea." However, then the QM2 said they came from Mr. M. The applicant alleged that he said they could not accept the tickets. However, CDR C again just shrugged. The YNC then entered the recreation room and began distributing tickets to other personnel. The applicant stated that he gave his ticket back to her, and told her they should not accept them because they were worth more than \$25 (the face value was \$44 each) and because they came from someone who had submitted an application for a permit. However, she continued to distri-

bute the tickets, and he saw her give three to members of the Group Engineering Department. The applicant alleged that CDR C's conduct in this matter comported with prior conduct he had observed. For example, he alleged that CDR C had once "attempted to act as an agent for a private commercial enterprise that was seeking preferential placement in a parade to be held in connection with the xxxxxxxx visit," and was only thwarted by the District Legal Officer.

The applicant alleged that because the tickets were for a game that very evening, he immediately reported the matter to LCDR B, his Division Officer. However, because LCDR B was not in the office, he went to see the XO. The applicant stated that the XO "listened attentively, was appalled, and immediately telephoned ... [the] Deputy Group Commander," who told the XO she would take care of the matter.

The applicant stated that when he returned to the planning office, CDR C was "fuming." The applicant told him that the tickets had to be returned, and CDR C said "What tickets? I didn't see them. I didn't touch them. He didn't give them to me. I don't see a problem with this. ..." Thereafter, CDR C received a call from the Deputy Group Commander, who told him to retrieve the tickets and return them to Mr. M.

The applicant stated that a week later, he spoke with LCDR B about the work environment in the planning office and stated that he thought they could use a facilitator. The next day, December 15, 1999, at a meeting with his own rating chain and that of CDR C, he was told that CDR C would be his new supervisor. When he objected, CDR C's prior supervisor from the Group, said to him, "You're the reason we're here. We wouldn't have to be here if you exhibited a little more teamwork." The applicant stated that after the others left, he again voiced his objections to the XO and CO, citing the fact that he had reported CDR C's acceptance of the tickets. However, the CO assured him that he would receive a fair OER.

The applicant alleged that during the remainder of the reporting period, CDR C "persisted in a hostile micromanagement campaign in which [the applicant] was doomed to failure." CDR C refused to communicate with him orally and instead sent him lengthy email messages. The applicant alleged that CDR C also "persistently bad-mouthed" him to the XO and made sure that the applicant received only a Letter of Commendation for his work in the planning office, whereas CDR C and the others received Meritorious Service Awards.

The applicant alleged that after he reported CDR C's ethical violation, the XO and CO should have protected him from reprisal but instead moved him into a position where CDR C "could destroy him professionally." The applicant stated that the entire disputed OER (the reporting officer's part as well as the supervisor's) should be removed from his record because CDR C actively campaigned to discredit him with his

reporting officer, the XO, and “set[] the groundwork—in his own part of the OER—for what appears in the remainder.”

SUMMARY OF THE RECORD

In 1991, the applicant enlisted in the Coast Guard Reserve. He had previously completed eight years of active duty in the Navy. In 1994, he was commissioned an ensign in the Reserve. Prior to the evaluation period for the disputed OER, the applicant’s evaluation marks were primarily 5s and 6s (on a scale of 1 to 7, with 7 being best). He was promoted to lieutenant (junior grade) on January 21, 1996.

On the OER immediately preceding the disputed OER, the applicant received seven marks of 5, ten marks of 6, and one mark of 7 in the various performance categories and a mark in the 6th place on the comparison scale, which denotes an “exceptional officer.” LCDR B served as his reporting officer and the XO served as his reviewer for that OER, while the Chief of the Facilities Inspection Division at the MSO was his supervisor. On January 21, 1999, the applicant was promoted to lieutenant.

The disputed OER, which covers the applicant’s service from August 1, 1998, to July 31, 2000, indicates that he was assigned to drill and perform active duty for special work (ADSW) at the XXXX planning office. In the section of the OER completed by CDR C, as the supervisor, the applicant received marks of 3 in the performance categories “Results/Effectiveness,” “Professional Competence,” “Teamwork,” and “Workplace Climate.” CDR C also assigned him seven marks of 4 (average) and two marks of 5 for his public speaking and writing abilities. CDR C supported the low marks with written comments, such as the following:

- “Other routine tasks completed with assistance from MSO officers.”
- “Minimal contributions to writing major documents . . .”
- “Best results when directly tasked by O-6.”
- “Depth of understanding clouded by tendency to over-delegate.”
- “Difficulty completing some routine tasks in a timely fashion.”
- “[A]t times contributed to uncomfortable team environment.”

CDR C also included the following comment in the disputed OER to support a mark of 4 for the performance category “Looking Out for Others”: “made tickets available to subordinates to attend sporting events and theater that would have gone unused.”

The XO, who served as the applicant’s reporting officer, did not concur with the supervisor’s marks and comments in block 7 of the OER, where concurrence is normally indicated by a reporting officer. The XO assigned the applicant one mark of 4, two marks of 5, and two marks of 6 in the performance categories and a mark in 4th place on

the comparison scale, which denotes a “good performer.” The XO included no negative comments and wrote that the applicant was “[h]ighly recommended for promotion with his peers.”

The CO, who served as the reviewer, exercised his discretion to add a comment page to the disputed OER with the following statements:

[The applicant] experienced professional differences with supervisor this reporting period. [He] was assigned several tasks directly by supervisor, but failed to complete these tasks to supervisor's satisfaction. Many other tasks assigned by Reporting Officer or myself as Commanding Officer were completed to my satisfaction. [The applicant] had several very successful innovations and initiatives accomplished during xxxxxxxx, including . . . I have received and still continue to receive numerous positive comments on this member's performance during the planning phases and throughout the execution of this challenging major marine event.

Both [the applicant] and supervisor displayed quite different management and leadership styles and had different strategies in approaching a project of this magnitude. It is unfortunate that [the applicant] could not overcome professional differences with supervisor. This is something [he] could have worked harder to overcome. It is my understanding that the supervisor, on several occasions, pointed out problems to [the applicant], but [he] did not satisfy supervisor in all performance areas during period of evaluation. [The applicant] has professional strengths in areas such as inter-agency coordination and viewing the big picture issues of events such as xxxxxxxxxxxx. These strengths were paramount in ensuring a successful event. On the other hand, supervisor preferred [him] to be more detail oriented and timely on certain tasks, and this is where the professional differences surfaced.

On October 5, 2000, the applicant received a Letter of Appreciation from the CO for his work in the planning office for XXXX. The reviewer completed his work on the disputed OER on October 10, 2000. However, the OER was not validated by the Coast Guard Personnel Command until March 19, 2001.

Following XXXX, from August 1, 2000, to July 31, 2003, the applicant served on a three-year extended active duty contractor as an instructor and academic section chief at the Coast Guard's Officer Candidate School. He received primarily marks of 6 and 7 on the three OERs covering this period and marks in the 6th place on the comparison scale. On August 1, 2003, he began a second three-year contract as Chief of the Leadership Programs Section at the Leadership & Quality Institute at the Academy. However, a letter in his application dated April 8, 2004, indicates that because the Coast Guard was experiencing “unprecedented billet growth within the active duty officer corps” and was contemplating involuntarily terminating numerous extended active duty contracts, he had voluntarily given up his contract and agreed to work on an ADSW basis. In August 2004, the applicant competed for promotion to LCDR as an “in zone” officer on the active duty promotion list (ADPL) and was not selected. Since then, he has apparently returned to inactive duty and civilian employment.

VIEWS OF THE COAST GUARD

On January 26, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant partial relief in this case. He based his recommendation on and adopted a memorandum on the case prepared by CGPC.

CGPC stated that in response to the applicant's allegations, it had conducted an investigation and "found no information to substantiate allegations that Supervisor had solicited or collected a bribe. The investigation found no evidence substantiating the allegation that Supervisor retaliated by generating a negative OER."

CGPC attached to its memorandum declarations written by CDR C, the XO, and the CO (see below). Based upon the declarations, CGPC stated that it was reasonable for the applicant to be concerned about retaliation after he reported CDR C's alleged conduct and that the applicant timely voiced his concerns to the XO and CO. However, CGPC stated, the declarations indicate that a "strained working relationship" existed between the applicant and CDR C even before the report about the tickets was made and that CDR C had already "expressed concerns to [the XO] that Applicant's inability to meet deadlines placed a strain on the entire XXXX staff." CGPC stated that the XO had already warned the applicant about how his failure to meet deadlines could be reflected in an OER.

CGPC stated that designating a new supervisor three-quarters of the way through an evaluation period is not contrary to regulation or policy. CGPC alleged that the applicant's new rating chain was properly composed since CDR C was the superior officer who most closely observed his work on a daily basis and having a "unified command" for an office is desirable. However, CGPC noted, the command was sufficiently concerned about the tensions between the applicant and CDR C to remain on the rating chain, instead of having CDR C's superiors at Group Xxxxx serve as the reporting officer and reviewer. Moreover, CGPC stated, "[a]dmonishing Supervisor to remain impartial ... yet leaving him in the rating chain undercut the validity of any OER that Supervisor could have prepared. A rating official with a grudge would have been able to mask retaliatory comments in objective-sounding terms—which Applicant asserts happened."

CGPC concluded that the "nature of Applicant's allegations and his working relationship with Supervisor fit the definition of "a personal interest or conflict" that could have disqualified Supervisor from evaluating Applicant" under Article 10.A.2.g. of the Personnel Manual. "Implementing the new rating chain just one week after Applicant's allegations surfaced intensified any 'bad blood' that Applicant correctly or incorrectly discerned." CGPC further stated that the "chance for a rating chain excep-

tion to exist in this case was so strong that it overcomes the presumption of regularity with respect to the manner in which Applicant's OER was completed. Doubt exists not only on the accuracy and fairness of Supervisor's portion, but on the actions of Reporting Officer and Reviewer, who developed a compromise rating chain and evaluated Applicant in a way calculated to counter-balance Supervisor's evaluation."

CGPC recommended that the Board remove the disputed OER and the failure of selection in August 2004 from the applicant's record. CGPC further recommended that the Board order that his date of rank be backdated and that he receive backpay and allowances if he is selected for promotion by the first selection board to review his record as corrected. However, CGPC recommended against having a substitute full OER prepared to replace the disputed OER. CGPC stated that it is difficult to imagine how an appropriate substitute supervisor with full knowledge of the applicant's performance could be identified or "how a substantive, accurate OER could be generated by an alternative Supervisor more than four years after the end of Applicant's reporting period." Therefore, CGPC recommended that the Board order the disputed OER to be replaced by a "continuity OER," which lists an officers duties but contains no comments or numerical marks.

Declaration of the Supervisor, CDR C

CDR C stated during the eight months he supervised the applicant, "it was the rule, not the exception, for his performance to be lacking and his behavior insolent." CDR C stated that he even asked for the applicant to be removed from the planning office and that a special OER be prepared to document his poor performance. He stated that he maintained a work log that shows "many examples of [the applicant's] poor performance, discussions with him or the command about his poor performance, or discussions with others tasked to complete his work."

CDR C alleged that he himself was added to the applicant's rating chain because the applicant's performance was lacking. He alleged that he was told in private that the new rating chain was intended to make the applicant "better respond to tasking and end his complaints that he was getting mixed messages from [LCDR B] and me." However, he alleged, the applicant's performance did not improve, and the disputed OER "was an accurate and fair reflection of his actual performance."

CDR C alleged that none of the marks or comments in the disputed OER were assigned because of any ethics complaint regarding "alleged tickets." He stated that he never solicited any tickets but that unsolicited tickets were received at the office from someone who had applied for a permit. He stated that he returned the tickets and submitted a copy of the cover letter he sent to Mr. M. The letter, dated December 9, 1999, states the following:

Although your gesture of kindness is greatly appreciated, I am sorry to have to return your Celtic tickets. However they were distributed, they ultimately wound up in the hands of members who are assigned to xxxxxxxx celebrations next July. Accordingly, this is a conflict of interest and would place those members in jeopardy and bring undue attention to your fireworks permit application.

Future contributions may be accepted via the Coast Guard Foundation in New London, CT or the local USO ... Doing so relieves both organizations of impropriety that may be construed when not really intended.

Declaration of the Reporting Officer, the XO

The XO stated that CDR C replaced LCDR B as the applicant's supervisor because LCDR B did not observe the applicant's performance on a daily basis while the applicant was assigned to the XXXX planning office. He stated that, before the applicant told him about the basketball tickets, CDR C had complained to him numerous times about the applicant's poor performance and failure to meet deadlines. The XO stated that because of CDR C's complaints, he had counseled the applicant about the need to meet deadlines and "that further infractions would result in a derogatory OER." The applicant acknowledged the warning but disputed CDR C's allegations about missed deadlines.

The XO stated that at some point during the evaluation period, the applicant told him that CDR C had accepted tickets to axxxxxxxxxxxxx basketball game from someone with an application pending before the office. The XO stated that he reported the allegation to the Deputy Group Commander, who stated that he would counsel CDR C. The XO stated that because both he and the Deputy Group Commander spoke to CDR C about the "requirement of impartiality in evaluating [the applicant]," he was satisfied that the applicant would receive a fair OER.

The XO stated that when he received the supervisor's portion of the disputed OER and saw the low marks, he spoke with the CO, and they agreed to speak to CDR C. CDR C "had ample documentation which supported his evaluation of [the applicant] and felt his evaluation was fair and unbiased." The XO stated that although the applicant's "ability to create and lead an inter-agency team [for XXXX] was noteworthy, ... [CDR C's] evaluation in [the applicant's] performing the more 'mundane' tasks associated with [XXXX] accurately reflected [his] performance." The XO stated that he tried to balance the OER by focusing on the applicant's duties with regards to marine safety rather than XXXX planning.

Declaration of the Reviewer, the CO

The CO stated that the rating chain for the XXXX planning office was created "by design" because the staff came from various offices but, as Captain of the Port, he had statutory authority for the overall safety of the event. He stated that "there was some

concern from the outset that [CDR C's] style of management was very assertive and so detail oriented such that my staff also desired to have input in OERs for MSO personnel. ... In fact, because of the concern that my staff had concerning a possible clash due to their very different leadership and management styles, we thought that the rating chain as designed would be helpful."

The CO stated that he thought the disputed OER was "generally accurate" but "too harsh in the areas where 3's were assigned." He stated that the applicant's performance did not warrant the low marks. However, he did not observe the applicant's performance on a daily basis. He noted that the applicant's service at the MSO had otherwise been "excellent."

The CO stated that during the evaluation period, he "heard rumor of the allegation of an ethical lapse on the part of [CDR C] referred to by [the applicant], but I do not believe that such an ethics violation was ever officially lodged, or if it was, it was likely addressed by Group Xxxxx. I would think that if this were true, it is possible that this could have colored the Supervisor's attitude toward [the applicant]."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 27, 2005, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. On February 22, 2005, the applicant responded.

The applicant stated that he was gratified by the Coast Guard's response to his application but argued that "there is no basis for ruling out *a priori* an effort to construct a substantive OER" to replace the disputed OER since a substantive OER "is much to be preferred over a continuity OER" when one's record is reviewed for promotion. He argued that the declarations of the CO and XO indicate that they can "recall quite a lot about the reporting period."

The applicant asked that LCDR B, who is currently assigned to CGPC, be called to act as his supervisor for a substitute OER. He submitted a draft of the supervisor's section of the proposed substitute with written comments supplied but no numerical marks assigned. He asked the Board to forward the draft to LCDR B and ask him "if he feels capable of performing the role of Supervisor" for a substitute OER. The applicant stated that if LCDR does feel capable, he could make whatever changes to the written comments he desires, or "start from scratch," and assign appropriate numerical marks. The applicant stated that he is confident that the XO and CO "would perform their duties on a revised substantive OER from which [CDR C] was excluded in an equally fair and impartial manner."

Finally, the applicant pointed out that CDR C's statement about "alleged tickets" in his declaration conflicts with the letter he wrote about actual tickets. He also argued that if CDR C had not actually "received" the tickets, he would not have been counseled about the impropriety of his actions by the Deputy Group Commander and he would not have been required to return them. The applicant also alleged that CDR C's cover letter returning the tickets was "disingenuous to the extent it implies ignorance about how the tickets were distributed" and who actually received them.

APPLICABLE LAW

Article 10.A. of the Personnel Manual governs the preparation of OERs. Article 10.A.1.b.1. provides that "[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." Articles 10.A.2.d.1., e.1., and f.1. of the Personnel Manual provide that each OER is prepared by the reported-on officer's "rating chain" of three senior officers: the supervisor (the officer to whom the reported-on officer answers on a daily basis), the reporting officer (the supervisor's supervisor), and the reviewer (the reporting officer's supervisor).

Article 10.A.2.g.1. of the Personnel Manual provides that an officer may be "disqualified" from serving on a subordinate's rating chain. Article 10.A.2.g.2.b. provides that the term "'Disqualified' includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or court of inquiry, or any other situation in which a personal interest or conflict on the part of the Supervisor, Reporting Officer, or Reviewer raises a substantial question as to whether the Reported-on Officer will receive a fair, accurate evaluation." Article 10.A.2.g.2.c. provides that "[i]f not already determined by the commanding officer, it is incumbent on the Reported-on Officer to identify to the next senior officer in the chain-of-command that an exception to the designated rating chain may exist. This issue should be raised as soon as practicable prior to the completion of the reporting period."

Article 10.A.4.c.4. instructs supervisors to make marks and comments for the first thirteen performance categories on an OER as follows (virtually identical instructions are provided 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 own observations, from those of any secondary supervisors, and from other information accumulated during the reporting period.

Article 10.A.4.c.8.a. instructs the reporting officer to complete the Comparison Scale on an OER by "fill[ing] in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known."

Article 10.A.4.g. permits the reported-on officer to file a reply to any OER within 14 days of receipt "to express a view of performance which may differ from that of a rating official." The reply is not an appeal and cannot result in the correction or removal of an OER, but it and any written responses to it by the rating chain are included in the officer's file along with the OER.

Article 10.A.3.a. provides that commands should prepare "continuity OERs"—which include only a description of the officer's duties and responsibilities and have no numerical marks or other comments—under special circumstances when it is inappropriate to prepare a substantive OER or when directed to do so because a substantive OER has been removed from the record by judicial or administrative action.

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely under *Detweiler v. Pena*, 38 F.3d 591 (D.C. Cir. 1994).³

2. The applicant alleged that the disputed OER is inaccurate and unjust because his supervisor, CDR C, was biased against him. The preponderance of the evidence in the record indicates that CDR C was inserted into the applicant's rating chain just one week after the applicant reported to the XO that CDR C had solicited and accepted professional basketball tickets from a civilian entity with an application pending before his office. Although CDR C has denied soliciting or receiving such tickets, the XO's declaration indicates that the applicant did lodge the complaint and that CDR C was counseled about the impropriety of his alleged actions by the Deputy Group Commander. The Board notes that CDR C was required to return the tickets to Mr. M,

³ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 "tolls the BCMR's limitations period during a servicemember's period of active duty").

and his cover letter appears to be intentionally vague about who received the tickets and how they were distributed.

3. The declarations of the XO and CO indicate that even before the applicant reported the receipt of the tickets, CDR C was dissatisfied with the applicant's work and that there was considerable tension between them. It is not clear to the Board that CDR C would have assigned the applicant better marks and comments even if the latter had never lodged his complaint about the tickets. The XO stated in his declaration that CDR C's "evaluation in [the applicant's] performing the more 'mundane' tasks associated with [XXXX] accurately reflected [his] performance." However, the CO stated that the marks of 3 that CDR C assigned to the applicant were "too harsh."

4. Under Article 10.A.2.g.2.b. of the Personnel Manual, an officer should be disqualified from serving on a rating chain 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 Board agrees with the Coast Guard that the applicant's report to the XO that his supervisor had solicited and received tickets to a professional basketball game from a civilian entity with an application pending before the XXXX planning office created a personal conflict that raised a substantial question as to whether the applicant would receive an accurate evaluation. This is true even if, as the Coast Guard alleges, the applicant's allegations about CDR C cannot be substantiated. Of course, an officer should not be able to disqualify members of his own rating chain by lodging frivolous or false complaints against them. However, in this case, the Board is persuaded that the applicant did not knowingly make a false or frivolous complaint, even if the Coast Guard has not substantiated his allegations.

5. The record indicates that the applicant promptly lodged his objection to having CDR C on his rating chain and that the XO and CO were aware of the potential for bias on the part of CDR C. Yet they put him in the applicant's rating chain anyway because they desired a unified chain of command in the planning office and hoped that their own presence on the rating chain would deter potential bias and encourage impartiality on the part of CDR C. CGPC opined that "[a]dmonishing Supervisor to remain impartial ... yet leaving him in the rating chain undercut the validity of any OER that Supervisor could have prepared. A rating official with a grudge would have been able to mask retaliatory comments in objective-sounding terms." The Board agrees with the Coast Guard that, as head of the planning office, CDR C was in a position where he could have created the appearance of poor performance, as the applicant has alleged. The Board is not persuaded that by remaining on the applicant's rating chain, the XO and CO cured the harm of assigning him a supervisor who should have been disqualified from serving on his rating chain under Article 10.A.2.g.2.b. of the Personnel Manual.

6. The applicant asked the Board to remove the disputed OER from his record. The Board may remove or correct an OER when an applicant proves by a preponderance of the evidence that the 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.⁴ In this case, the Board finds that the preponderance of the evidence in the record indicates that, by inserting CDR C into the applicant’s rating chain, his command committed a prejudicial violation of Article 10.A.2.g.2.b. of the Personnel Manual.

7. The applicant has asked that the entire disputed OER be removed from his record, rather than just the part prepared by his supervisor, CDR C. He alleged that the XO’s evaluation is inaccurate because CDR C waged a campaign of misinformation by denigrating his performance to the XO. The Coast Guard has recommended that the entire OER be removed. CGPC stated that “[d]oubt exists not only on the accuracy and fairness of Supervisor’s portion, but on the actions of Reporting Officer and Reviewer, who developed a compromise rating chain and evaluated Applicant in a way calculated to counter-balance Supervisor’s evaluation.”

8. In BCMR Docket No. 151-87, it was held that “an OER will not be ordered expunged [in its entirety] unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material.” The Board finds that it is no less likely that bias on the part of CDR C affected his communications to the XO about the applicant’s performance than that it affected the marks he assigned in the OER. Although the XO stated that in preparing his part of the OER, he focused on the applicant’s performance of duties concerning marine safety rather than XXXX planning, his declaration also indicates that he developed an overall negative opinion of the applicant’s efforts during the reporting period because of information supplied by CDR C. Given this potential influence and the fact that the XO tried to “counter-balance” CDR C’s marks, the Board agrees with CGPC that the applicant has proved that it is “impossible or impractical to sever the incorrect/unjust material from the appropriate material.” Therefore, the entire OER—including the CO’s comment page in which he attempted to explain the divergent evaluations by CDR C and the XO—should be removed from the applicant’s record.

9. The applicant asked that the disputed OER be replaced with one for which LCDR B would serve as the supervisor. He asked the Board to ask LCDR B if he feels able to prepare an accurate OER for the applicant. However, the XO has stated that the revision of the applicant’s rating chain was necessary because LCDR B did not work in the planning office and so did not observe his performance on a daily basis. Moreover,

⁴ *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

because of the applicant's delay in applying to this Board, more than four years have passed since the end of the evaluation period. Therefore, the Board is not persuaded that an accurate OER could be prepared by LCDR B no matter what his opinion may be. When the Board orders an OER removed from the record because of an error or injustice, it usually orders that the OER be replaced by a continuity OER in accordance with Article 10.A.3.a. of the Personnel Manual. Although substantive OERs are to be preferred to continuity OERs, the Board will not order the creation of an OER more than four years after the reporting period by a "supervisor" who had little if any opportunity to observe the applicant's performance of his primary duties. Therefore, the disputed OER should be replaced by a continuity OER.

10. The applicant asked that his failure of selection for promotion to LCDR in August 2004 be removed from his record and that his date of rank be backdated—with corresponding backpay and allowances—if he is selected for promotion by the next board to review his record as corrected. The Coast Guard recommended that the Board grant this relief. To determine if the applicant is entitled to such relief, the Board must answer the following two questions:⁵ First, was his record prejudiced by the error in the sense that it appeared worse than it would have in the absence of the error? Second, even if there was some such prejudice, is it unlikely that he would have been selected for promotion in August 2004 in any event? The Board finds that the applicant's record was clearly prejudiced by the disputed OER in that it contains significantly lower marks than any other OER in his record. Moreover, in light of the fine quality of the remainder of his record, the Board finds that in the absence of the disputed OER, it is not unlikely that he would have been selected for promotion. Therefore, the Board finds that the applicant is entitled to have his failure of selection for promotion to LCDR in August 2004 removed from his record. In addition, if he is selected for promotion (as an "in zone" candidate) by the next LCDR selection board to review his record, his date of rank should be backdated to what it would have been had he been selected for promotion in August 2004, and he should receive corresponding backpay and allowances.

11. Accordingly, the applicant's request should be granted except that the disputed OER should be replaced by a continuity OER.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁵ *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

ORDER

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

The OER covering his service from August 1, 1998, through July 31, 2000—including the reviewer's comment page—shall be removed from his record. A continuity OER shall be prepared and placed in his record in its stead.

His failure of selection by the ADPL LCDR selection board that convened in August 2004 shall be removed from his record. He shall be considered "in zone" for promotion by the next LCDR selection board to review his record as corrected by this order. If he is selected for promotion by the next LCDR selection board to review his record, his LCDR date of rank shall be backdated to what it would have been had he been selected for promotion in August 2004, and he shall receive corresponding back-pay and allowances.

Bruce D. Burkley

Jordan S. Fried

George J. Jordan