

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-035

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXX, LCDR

FINAL DECISION

AUTHOR: Ulmer, D.

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. The Chair docketed the case on December 30, 2005, upon receipt of the completed application and military records.

This final decision, dated August 31, 2006, 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 changing the "3" to "4" in the Health and Well-being performance dimension on his officer evaluation report (OER) for the period from May 1, 2000 to April 30, 2001 (disputed OER).

APPLICANT'S ALLEGATIONS

The applicant stated that his rating chain originally assigned him a mark of "4" in the Health and Well-being category on the disputed OER. By letter dated August 15, 2001, Commander, Coast Guard Personnel Command (CGPC)¹ returned the disputed OER to the rating chain for correction of deficiencies. In particular, CGPC stated that "[a] '4' in block 8.e. is inconsistent with the OER performance standard of an officer who

¹ The office within CGPC responsible for processing active duty OERs is CGPC-opm and is referred to in this decision as OPM or OPM-3.

has had an alcohol incident. Please adjust the mark to better represent the member's performance during the reporting period." The applicant alleged that in response to the CGPC letter, his rating chain lowered the Health and Well-being mark to "3".

Article 10.A.4.j. of the Personnel Manual states that CGPC-opm-3 staff reviews OERs paying particular attention to inconsistencies between numerical evaluations and written comments. The provision further states that the review is not intended to question a rating official's judgment about a subordinate, but to ensure that OERS have been prepared in accordance with officer evaluation system guidelines. The applicant argued that this provision gives CGPC the authority to determine whether marks and comments are consistent, but not to arbitrarily set a ceiling on what marks an officer can receive or direct the rating chain in how to correct the inconsistency, as he alleged was done in his case. In this regard the applicant stated the following:

By returning an OER to the rating chain for inconsistencies between the numbers and comments, OPM-3 is in essence saying that (in their interpretation) the comments do not support the mark(s) assigned. Clearly, the performance standards are open to interpretation, and in my case, OPM-3 and my rating chain interpreted them differently. Rather than allowing my rating chain the option of providing additional comments to support the intended mark of "4", Opm-3 mandated that I receive a mark lower than "4". There is no OES guidance that gives them such authority. Section 10.A.4.k. of the Personnel Manual states, "*On those marks indicated by CGPC-opm-3 as not being supported, the rating chain should either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided.*" So if the rating chain disagrees with OPM-3's interpretation, they can strengthen the comments to support the original marks rather than lowering the marks to a level they believe the reported-on officer does not deserve. Similarly, an OER Reviewer may also return an OER to the rating chain for inconsistencies between the numbers and comments, but may not direct the manner in which the mark should be changed (Section 10.A.2.f.). In both cases, the guidance provides the rating chain two alternatives: either lower the mark, or provide additional narrative. In my case, the rating chain's hands were unjustly tied because OPM-3's letter clearly states that nothing higher than a "3" would be accepted. Based on the phrasing of that letter, as well as phone conversations with OPM-3 staff, the members of my rating chain did not believe they had the option . . . of providing additional comments to support the intended mark.

As mentioned earlier, the applicant stated that OPM's review of an OER is not intended to question the rating official's judgment. In this regard, he stated that the rating chain is familiar with the reported-on officer's performance while OPM is not.

He stated that his rating chain had carefully weighed all factors before assigning the "4", but OPM directed that he receive a lower mark based solely on the knowledge that he had an alcohol incident during the period. He argued that OPM had no information on the nature of the incident or about his other performance throughout the period, yet overturned the rating chain's decision anyway. He again stated that OPM removed the option of having his rating chain strengthen the narrative to support the "4". The applicant stated that OPM does not have authority to set ceilings on officer's marks for particular incidents. Doing so he argued, assumes that all incidents are the same, which is clearly not true.

The applicant concluded his statement by offering the following reasons why the Board should raise the Health and Well-being mark to "4".

- a. The Health and Well-being category measures the officer's "ability to invest in the Coast Guard's future by caring for the physical health and emotional Well-being of self and others." My alcohol incident did not negatively impact my ability to do that, as attested to by the original mark of "4" assigned by my rating chain. On the night following the alcohol incident, I stood duty as a HH-60J Aircraft Commander . . .
- b. Throughout the reporting period I maintained a healthy lifestyle and exercised regularly to maintain excellent physical condition. My exercise regimen included weight lifting, cardiovascular work, bicycling, and hiking. Through this program, I optimized my performance, managed stress, maintained vitality, alertness and energy, and supported my emotional Well-being . . . This is evidenced by my performance documented on the OER as an Alaska Qualified HH60J Flight Examiner who routinely demonstrated stamina and epitomized alertness and stress management by successfully executing lengthy operational flying sorties . . . in Coast Guard Aviation's most demanding and hazardous flight environment.
- c. The Reviewing Officer's comments indicate that I, ". . . worked tirelessly, particularly during the critical late spring and early summer period, ensuring members of the afloat and ashore command's PCS move and housing needs were met."
- d. Following the Alcohol incident and in accordance with Coast Guard policy, I underwent a comprehensive screening at a dependency clinic. The resulting diagnosis indicated no evidence of alcohol abusive tendencies or dependence.

e. While it is true that I "failed to meet minimum standards of sobriety" ("2" block) on one occasion, I also met many of the standards in the "6" block. Both I and my Supervisor and Reviewer believe that the many examples of performance above the "4" level combined with one example of performance below the "4" level averaged out to performance at the "4" level.

The applicant stated that he did not submit a reply to the OER, although he drafted one, on the advice of senior officers who thought the reply would be interpreted by promotion boards as an attempt to escape responsibility for the alcohol incident.

Statements in support of the applicant

1. The supervisor for the disputed OER stated that the command cadre discussed at great length how the alcohol incident should be documented. The command approved a decision to award a mark of "4" in Health and Well-being and lowering the judgment mark by two points on the applicant's OER. The decision was deliberate and believed to be within the spirit of documenting the applicant's momentary indiscretion. "The OER was returned with direction from [OPM] indicating a below average mark was required in Health and Well-being." The supervisor stated that the Personnel Manual does not require a specific mark for an alcohol incident. He stated that the command adjusted the applicant's marks to a lower level than would have normally been assigned to an officer of such high caliber, as the applicant. In the supervisor's opinion, OPM may have inappropriately overturned the command's interpretation for a much more strict interpretation in opposition to the judgment and intentions of [the applicant's] rating chain.

2. The applicant's commanding officer, who was also the reviewer for the disputed OER, stated that the OER that he initially approved and submitted for the period in question was rejected by [OPM] and that his discretion as a CO was taken from him because he was given no option except to reduce the mark in Health and Well-being to "3". He stated that OPM's letter of August 15, 2001, clearly stated that he must correct the deficiency before the OER would be accepted and that his follow-up phone calls to the OPM office validated their position.

The CO stated that it was his responsibility to ensure that personnel within his command received evaluations in accordance with their performance over the entire reporting period. He argued that OPM's conclusion that the original OER was inconsistent in regard to Health and Well-being is strictly interpretative, as evidenced by the fact that there is no specific guidance provided in the Personnel Manual. The CO stated, "I was wrongly constrained in my authority, and this superior officer paid the price. It is a tragedy that [the applicant] is today not an O-5 (CDR) or higher."

The Disputed OER

As previously stated, the applicant was given a "3" in the category of Health and Well-being, which is at issue in this case. OER forms contain prewritten standards by which an officer is marked. According to the form, the Health and Well-being category measures an officers "ability to invest in the Coast Guard's future by caring for the physical health and emotional Well-being of self and others." The predetermined standard for a mark of 2 in this category reflects that an "officer failed to meet minimum standards of weight control or sobriety. Tolerated or condoned others' alcohol abuse. Seldom considered subordinates' health and well-being. Unwilling or unable to recognize and manage stress despite apparent need." A "3" reflects an officer's performance that falls between the prewritten standards for a 2 and "4". The prewritten standard for a "4" in this category means that an officer has "maintained weight standards. Committed to health and well-being of self and subordinates. Enhanced personal performance through activities supporting physical and emotional well-being. Recognized and managed stress effectively."

The applicant's other marks on the disputed OER were one "4" in "Evaluations", two 5s, twelve 6s, and two 7s. The comments supporting the marks on the OER were extremely flattering but neither the supervisor nor reporting officer mentioned the alcohol incident in their comments.

The reporting officer rated the applicant in the fifth block to the right in block 9. on the OER, which is where the reporting officer compares the applicant with all other LCDRs that he has known in his career. This mark equates to a 5 on a scale of 1 to 7, with 7 being the best. A mark of 5 describes an excellent performer who should be given the toughest and most challenging leadership assignments. The reporting officer described the applicant's potential as follows:

[The applicant] is a superb performer & dynamic leader w/unlimited potential. He demonstrated exemplary tact/poise while serving as unit POC for politically sensitive project to remove/repatriate Native Alaskan remains from Coast Guard property. While acting as Operations Officer, he consistently showed keen judgment/superior grasp of risk management & operational principles to make intelligent/constructive decisions & recommendations. Member has clearly demonstrated an exceptional ability to lead and motivate others to achieve CG/unit goals. He is the best candidate & is well qualified for future assignments as an Air station Operations Officer; highest recommendation for promotion to O5 with peers.

The reviewer for the OER, who was also the commanding officer attached comments to the OER on a separate sheet. The reviewer's comments were favorable

and mentioned the alcohol incident about halfway down the page. He wrote the following with respect to the alcohol incident:

[The applicant] had an alcohol incident during this period. As a result he did not receive a 7 in judgment, a mark he would have otherwise received. Since the incident, I have closely watched him to determine if this was the start of an undesirable trend and to ensure his performance stayed at the same high level. While remorseful and quite obviously shaken by the event, in the months that I have scrutinized him, I am very confident that this was a singular event, and that [the applicant] quickly got back on step performing at the same high level that I had noted in the past. He is still exceptionally motivated and career oriented, and I do not sense that this incident will detract him from achieving his professional goals.

Alcohol Incident Letter

The CO documented the alcohol incident in a March 7, 2001 letter counseling the applicant about it. The applicant was told that his March 3, 2001 alcohol incident was his first alcohol incident and that any further such incidents would result in his being processed for separation. The letter was acknowledged by the applicant and placed in the applicant's military record.

An administrative remarks page (page 7) of the same date was placed in the applicant's military record, noting the applicant's referral to Unit Collateral Duty Addictions Representative (CDAR) and medical officer for evaluation due to an alcohol incident. The page 7 stated that a flight surgeon diagnosed the applicant with alcohol misuse pending an alcohol screening on March 21, 2001, and grounded the applicant until the proper personnel screened him. The applicant was placed on a pre-treatment plan pending alcohol screening of abstinence from alcohol, weekly meetings with the unit's CDAR, and attendance at a minimum of two AA meetings per week.

VIEWS OF THE COAST GUARD

On May 15, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG stated that the CO's comments in the disputed OER were consistent with Coast Guard policy. Article 20.A.2.d. of the Personnel Manual describes an alcohol incident as:

Any behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed

Services, or is a violation of the Uniform Code of Military Justice (UCMJ), State or local laws. The member need not be found guilty at courts-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.

The JAG further stated that OPM had the authority to return applicant's OER to the CO, with a request for him to adjust the mark in Health and Well-being to better represent the member's performance during the reporting period. In this regard, OPM noted that the "4" in Health and Well-being was inconsistent with the "OER performance standard of an officer who had has an alcohol incident," and that the rating chain subsequently returned it to OPM with the mark lowered to a "3". The JAG noted that the applicant did not submit a reply to the OER, which he had the right to do.

The JAG noted the applicant's argument that OPM's letter directed his rating chain to lower the mark, and further noted the supervisor's and CO's statements that the "direction from [OPM] indicated a below average mark was required." The JAG stated that Article 10.A.4.k. of the Personnel Manual states that for marks OPM believes are unsupported, the rating chain should either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided. The JAG stated that OPM's advice to the CO, although possibly incomplete, was still permissible under the Personnel Manual. In addition, the Coast Guard obtained a statement from the reporting officer for the disputed OER. According to the JAG, the reporting officer stated that although he believes that CGPC directed the applicant's rating chain to lower the mark, he agreed with OPM's review and interpretation based on the wording of the standard for a "2". Therefore, the JAG stated that the reporting officer agreed that the applicant did not meet the minimum standards for sobriety. The JAG concluded as follows:

Although Applicant has provided some evidence, he did not meet his burden of production. The action taken by [OPM] under its review authority was proper. Applicant has shown insufficient evidence of any error on the part of the Coast Guard. Additionally, [the reporting officer's] sworn statement tends to dispute the Reviewer's and Supervisor's comments that the rating chain disagreed with the mark of "3". [The reporting officer] states that he agrees with [OPM's] guidance and the revised mark as submitted.

The JAG attached a memorandum from CGPC as part of the advisory opinion. GCPC stated that the applicant's contention that OPM directed that nothing higher than a "3" would be accepted in the Health and Well-being category of the disputed OER is inaccurate. CGPC stated that in fact, the letter from OPM states that "a '4' in block 8.e. is inconsistent with the OER performance standard of an officer who has an alcohol

incident. Please adjust the mark to better represent the member's performance during the reporting period." CGPC stated that OPM is correct in stating that a mark of "4" is inconsistent for an officer who received an alcohol incident for DUI. CGPC further stated as follows:

In light of the irrefutable evidence that the applicant failed to meet the minimum standards of sobriety, a criteria of the below-standard mark of 2 for the Health and Well-being performance dimension, and the absence of other strong, specific supporting documentation that the Applicant excelled in other areas of the dimension, CGPC was correct in their statement that the mark needed to be adjusted to better represent the member's documented performance.

CGPC stated that the rating chain might have believed that they did not have the option of submitting additional comments to support the intended mark. However, CGPC argued that the applicant failed to provide sufficient evidence to prove that OPM violated its own policy. In this regard, CGPC stated that while the letter from OPM does not specifically state that additional comments could not be provided to support the initial mark of "4", neither does it state that the rating chain could not provide additional supporting comments. CGPC noted that while the CO claimed that in telephone conversations with OPM, the rating chain was not given the option to provide additional comments to support the "4", the CO did not provide any names of individuals he spoke with at OPM. "One has to wonder that if indeed there were other compelling achievements that would have more strongly supported the mark for Health and Well-being, why was this information not included in the initial evaluation or in the corrected evaluation."

Statement from the Reporting officer

In addition to the comments mentioned above, the reporting officer, who is responsible for assigning the mark in Health and Well-being, wrote the following in pertinent part:

During this reporting period, [the applicant] was cited by the local policemen for Driving Under the Influence (DUI). Since [the applicant] was a top notch officer at our unit, the command cadre labored long and hard over the marks and comments for his OER. The command's intent was to document the infraction and hold him accountable while taking into account his otherwise outstanding performance record. Our ultimate decision was to dock his marks in the performance dimensions we felt would hold him accountable for this singular lapse of judgment: Judgment and Health and Well-being. This strategy resulted in [the applicant's] OER being submitted with an assigned mark of "5" in

judgment, where without the incident he would have earned a "7". Likewise, we assigned him a mark of "4" in Health and Well-being, where without the incident he would have earned a "6".

* * *

In retrospect, I agree with [OPM's] review and interpretation based on the wording found in the "2" block of the Health and Well-being dimension which says, "failed to meet the minimum standards of weight control or sobriety." Given the unfortunate fact that [the applicant] did incur a DUI during this OER period, I feel that G-OPM did their job by identifying a mark inconsistent with the verbiage cited and responded correctly by notifying the command to adjust that mark to meet the standard outlined in that dimension.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 6, 2006, the BCMR received the applicant's response to the views of the Coast Guard. He disagreed with them. The applicant took issue with almost each paragraph of the advisory opinion and restated many of the arguments that he made in his original statement to the Board.

Specifically, the applicant disagreed with the statement in the advisory opinion that OPM's direction was permissible under the Personnel Manual. He restated his contention that OPM exceeded its authority by directing the rating chain to lower the mark to "3". He argued that for the Coast Guard to characterize the letter as advisory is disingenuous, since the rating chain believed they had no option other than to lower the mark. He points to the statements of the CO and supervisor, in which each stated that they believed they were directed to lower the mark from "4" to "3".

The applicant further argues that the advisory opinion mischaracterizes the statement obtained from the reporting officer. In this regard, the applicant stated that the reporting officer did not state that he agreed with OPM's review, but rather he stated that in retrospect he agrees with it. The applicant stated that retrospective reconsideration has been rejected by CGPC for amending a record and therefore it should not be a basis for failing to correct a record. The applicant stated that BCMR No. 2000-016 states that retrospective reconsideration cases are those in which an evaluating official seeks to retroactively change the opinions expressed in that evaluation. "Most such after-the-fact statements by raters are given little weight because a contemporaneous expression of opinion representing a fair and accurate assessment in the context of the specific rating period at issue is to be preferred over a non-contemporaneous one . . ."

The applicant continued to argue that the rating chain carefully considered his performance including the alcohol incident when it originally assigned him a "4" in Health and Well-being. Therefore, he disputed CGPC's comment that the rating chain failed to hold him accountable or that it failed to accurately evaluate his performance. In this regard, the applicant stated that officers are evaluated throughout the entire reporting period, in his case a total of 365 days. He argued that in assigning a mark of "4", the rating chain considered all of his performance and considered the alcohol incident to be an aberration, a one time incident, and not indicative of his typical behavior.

The applicant argued that any contention by the Coast Guard that the alcohol incident is so grave that no other performance during the period can raise the mark above "3" is not supported by the OES guidance. He stated that officers often have one-time performance which falls within the standards of the "2" block, but their rating chains do not assign them 2s or 3s because they base their evaluation on the entire period. He stated that all officers make mistakes, but it is incumbent on the rating chain to assign marks based on full knowledge of the circumstances surrounding those mistakes and the reported-on officer's other performance throughout the period. The applicant stated that his rating chain, in response to what they knew was a one-time incident, held him accountable by lowering his mark in Health and Well-being from "6" to "4" and his mark in judgment from 7 to 5. He stated that his CO had the responsibility to ensure that the OER reflected a reasonably consistent picture of his performance, which is exactly what his rating chain did before it was wrongly constrained by OPM.

The applicant submitted a copy of a statement on his behalf from the CO to the selection board. It reads in pertinent part, as follows:

[The applicant] has a proven track record of sustained exemplary performance. He is an officer I implicitly trust and rely upon for his advice on the most complex operational matters. He has learned a valuable lesson and I hope this isolated infraction can be put behind [him] in light of the scores of noteworthy contributions this member has performed in the past, and is most capable of performing in his future career as a Coast Guard Officer.

APPLICABLE REGULATIONS

Personnel Manual

Article 10.A.1.b.2. c. states that there are prescribed expectation levels within each performance dimension. The standards are written to provide a common frame of

reference among rating officials to which an officer's observed performance and qualities may be compared. Each dimension has three separate standards, as follows: below standard which is performance not measuring up to the levels expected; standard performance which is the high level of performance expected of all Coast Guard officers; and above standard which is superlative performance.

Article 10.A.2.i.2.c. states that the Officer Evaluations Branch (CGPC-opm-3) provides final quality control review of OERs containing substantive errors, including "restricted" remarks.

Article 10.A.4c.7.a. & b. of the Personnel Manual provide the following guidance to reporting officers in completing section 8. of the OER (which includes the Health and Well-being category):

This section measures an officer's personal and professional qualities. Each performance dimension is defined in terms of three performance standards: below standard, standard, or above standard . . . Reporting Officers must read each standard carefully. A space for supporting comments follows each set of dimensions.

For this Evaluation area, the Reporting Officer shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Reporting Officer shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards . . . After determining which standard best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form itself.

Article 10.A.4.j.2. of the Personnel Manual states that CGPC-OPM reviews OERs for substantive errors, paying particular attention to inconsistencies between the numerical evaluations and written comments. This provision further provides that the purpose of the review is to ensure OERs have been prepared in accordance with OES guidelines and not to second-guess the rating official's judgment. Subsection 3. of this provision states that reports found unacceptable are returned to the reporting officer via the reviewer with a letter identifying areas of correction.

Article 10.A.4.k.1. states that on those marks indicated by OPM as not being supported by the comments, the rating chain should either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided.

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 section 1552 of title 10 of the United States Code. The application was timely.²

2. The applicant was involved in an alcohol incident as documented by a counseling letter dated March 7, 2001, and a page 7 of the same date, both of which are a part of his military record. The applicant was initially assigned a mark of "4" in the Health and Well-being category of the reporting officer's section of the disputed OER. There was no mention of the alcohol incident by either the supervisor or reporting officer in the OER. However, the reviewer, who was the CO, attached a comment page to the OER in which spoke very highly of the applicant's performance, skills, and abilities. About halfway down on the page, he mentioned that the applicant had been involved in an alcohol incident during the reporting period. (Reviewers do not assign marks in any of the performance categories.) The OER was forwarded to OPM and on August 15, 2001, OPM returned it to the CO/reviewer stating that multiple reviewers of the OER agreed that it contained inconsistencies that must be corrected before it could be accepted into the officer's record. The OPM letter further stated that a "4" in Health and Well-being was inconsistent with the performance standard of an officer who has had an alcohol incident, and requested that the rating chain adjust the mark to better represent the member's performance during the reporting period. The reporting officer lowered the mark to "3" and returned it to OPM, and it was subsequently placed into the applicant's record.

3. The applicant does not deny the alcohol incident; nor does he deny OPM's authority to return the OER to the reporting officer for correction of substantive errors. He alleged however that OPM exceeded its authority by directing the rating chain on how to correct what it interpreted to be an inconsistency between the mark of "4" in Health and Well-being category and the applicant's involvement in an alcohol incident during the reporting period. The applicant claimed that OPM mandated that the rating chain assign a below average mark ("4" is considered an average mark) and that OPM's letter clearly stated that only a mark of "3" or below would be accepted, in violation of Article 10.A.4.j.2. of the Personnel Manual. This provision states that the OPM reviews OERs for substantive errors, paying particular attention to inconsistencies between the numerical evaluations and written comments. This provision further provides that the

² See *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").

purpose of the review is to ensure that OERs have been prepared in accordance with OES guidelines and not to second-guess the rating official's judgment. Subsection 3. of this provision states that reports found unacceptable are returned to the reporting officer via the reviewer with a letter identifying areas of correction.

4. The rating chain may have interpreted OPM's letter as directing them to assign the applicant a "3" in Health and Well-being, but the letter itself contains no language directing, ordering, or mandating the rating chain to lower the applicant's mark in Health and Well-being to "3". The letter states, "A '4' in block 8.e. is inconsistent with the OER performance standard of an officer who has had an alcohol incident," and to "[p]lease adjust the mark to better represent the member's performance during the reporting period." While the letter suggested, and maybe strongly so, that the "4" in Health and Well-being was inappropriate for an officer who had an alcohol incident approximately two months prior to the end of the reporting period, the letter by no means directed or mandated a "3" or any grade.

5. The rating chain, particularly the CO (reviewer) and the supervisor stated that based on the letter and conversations with OPM staff, they felt they had no other option but to assign a "3". In this regard, the supervisor stated that OPM returned the OER "indicating that a below average mark was required in Health and Well-being." The Board notes the supervisor's use of the word *indicating* rather than the word *ordering* or *directing*. Such evidence supports the conclusion that OPM did not order or direct a lower grade, even though it may have strongly suggested lowering the grade as the appropriate avenue. The CO stated that he felt he had no choice but to change the mark to "3" because OPM's letter stated that the deficiency must be corrected before the OER would be accepted into the applicant's record. This was the CO's interpretation of the letter but it simply does not state that the reporting officer had to assign the applicant a "3". In addition, the letters from the rating chain stating that they believed they had no option but to lower the mark comes approximately three years after the OER was completed and placed in the record. There are no letters to CGPC from the rating chain or contemporaneous notes of their telephone conversations with OPM staff that corroborate their contentions that at the time they believed that OPM left them no choice but to lower the applicant's mark in Health and Well-being. In light of the above, the Board finds that the applicant has failed to prove by a preponderance of the evidence that OPM directed the rating chain to give him a "3" in Health and Well-being. Even if the letter is interpreted as direction from OPM to lower the mark, the Board finds that such was permissible under OPM's responsibility for the overall integrity of the OES system and its responsibility for final quality control review of OERs. Neither Articles 10.A.4.j. nor 10.A.4.k. of the Personnel Manual contains language prohibiting OPM from directing how substantive errors should be corrected. In contrast, Articles 10.A.2.e.2c. and 10.A.2.f.2.c. allow the reporting officer and reviewer, respectively, to return an OER to the subordinate members of the rating chain for correction of errors, omissions, and inconsistencies, but they prohibit them from directing the manner in

which a mark or comment should be changed. The Personnel Manual contains no such provision for OPM. There has to be some entity to ensure that OERs are prepared in accordance with policy and to ensure consistency in the OER preparation and evaluation process throughout the Coast Guard. That authority was reserved for OPM.

6. The applicant's arguments in this case tend to suggest that OPM returned the OER only for an inconsistency between a mark and comment. This really is not the case because the OER as originally submitted did not have an inconsistency between the "4" and the comments provided by the reporting officer. In fact had the reviewer not submitted a comment page, there would have been no indication of the alcohol incident in the evaluation at all. OPM returned the OER because the "4" was inconsistent with the prewritten standards on the OER for marking an officer who had an alcohol incident during the reporting period documented by a counseling letter and page 7 in his military record.

7. Articles 10.A.4c.7.a. & b. of the Personnel Manual provide the following guidance to reporting officers in completing section 8. of the OER (which includes the Health and Well-being category)

This section measures an officer's personal and professional qualities. Each performance dimension is defined in terms of three performance standards: below standard, standard, or above standard . . . Reporting Officers must read each standard carefully. A space for supporting comments follows each set of dimensions.

For this Evaluation area, the Reporting Officer shall review the Reported-on Officer's performance and qualities observed and noted during the reporting period. Then, for each performance dimension, the Reporting Officer shall carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards . . . After determining which standard best describes the Reported-on Officer's performance and qualities during the marking period, the Reporting Officer fills in the appropriate circle on the form itself.

Article 10.A.1.c. of the Personnel Manual defines below standard as "performance not measuring up the levels expected." Standard performance is defined as "the high level of performance expected of all Coast Guard officers." Above standard is described as "superlative performance." The reporting officer in this case apparently failed to "carefully read the standards and compare the Reported-on Officer's performance to the level of performance described by the standards" because the prewritten standard for a 2 in health and Well-being category describes an officer who "*failed to meet minimum standards of weight control or sobriety.*" A documented alcohol

incident is surely evidence of a failure to meet the minimum standard of sobriety. The "4" in Health and Well-being as originally assigned indicated that during the reporting period, the applicant met the high standards expected of every officer. This is simply not the case. Officers are not expected to be involved in alcohol incidents, and members of the rating chain are not expected to evaluate officer's performance without regard to the prewritten OER standards. OPM found, and the Board agrees, that the OER contained a substantive error in that the "4" in Health and Well-being was inconsistent with the prewritten standard on the OER form for an officer who had an alcohol incident during the reporting period.

8. OPM having found substantive error in the OER, returned it to the reporting officer via the reviewer as required by Article 10.A.4.j.3. of the Personnel Manual, identifying the areas for correction. Nowhere in this section of the Personnel Manual does it state that OPM cannot suggest, advise, counsel, or state how the correction should be made. The applicant argued that in returning the OER for correction, CGPC should have given the rating chain options of either providing additional narrative to support the "4" or adjusting the mark to fit the information already provided, as required by Article 10.A.4.k. of the Personnel Manual. This provision states in pertinent part: "On those marks indicated by [OPM-3] as not being supported [by the comments], the rating chain should either provide additional narrative support reflecting specific performance observations or adjust the marks to the information already provided." However, as stated above, it was not an inconsistency between the original mark and comments that caused the OER to be returned, but the reporting officer's failure or refusal to mark the appropriate prewritten standard in Health and Well-being on the OER form that reflected the applicant's involvement in an alcohol incident. The rating chain readily admitted that it made a decision to lower the applicant's mark in Health and Well-being from "6" to "4", with no mention of the alcohol incident in any of the supervisor's and reporting officer's comment sections of the OER. For good reason, mentioning the applicant's involvement in the alcohol incident would have required the reporting officer to chose the prewritten performance standard on the OER that revealed the applicant had failed during the period to meet minimum standards of sobriety. Neither the applicant nor the rating chain provided examples of what additional comments could have been added to section 8. that would have negated the fact that this applicant was involved in an alcohol incident during the reporting period.

9. An alcohol incident, particularly one that is documented in an officer's military record, is a significant performance event. The applicant and CO suggest that it was an aberration and that its importance was mitigated by the applicant's superior performance in other areas. If such were the case, the CO could have exercised his authority and discretion under Chapter 20 of the Personnel Manual and not classified the DUI as an alcohol incident. Moreover, the Health and Well-being dimension is for measuring an officer's "caring for the physical health and emotional well-being of self and others," which includes sobriety. There are seventeen other performance categories

for evaluating the applicant's superior performance of his other duties. Therefore, not only is the "4" inconsistent with the prewritten Health and Well-being performance standards for an officer who did not maintain sobriety during the reporting period, it is also inconsistent with the applicant's military record which documents an alcohol incident approximately two months prior to the end of the reporting period.

10. The Board finds that OPM acted in accordance with its responsibility under the Personnel Manual when it returned the OER to the reporting officer via the reviewer and informed the reporting officer that the mark of "4" in Health and Well-being was inconsistent with the performance standard of an officer who was involved in an alcohol incident during that reporting period. The Board finds no error or injustice in the manner in which the OER was returned for correction.

11. Accordingly, the applicant has failed to prove an error or injustice in this case and his request for relief should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of LCDR XXXXXXXXXXXXXXXXXXXXX, USCG, for correction of his military record is hereby denied.

Elizabeth F. Buchanan

Adrian Sevier

Thomas H. Van Horn