

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

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Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2006-065**

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**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 application was docketed on February 24, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated November 21, 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 make the following corrections to his military record: remove the officer evaluation report (OER) for the period from June 1, 2002 through June 30, 2003 (first disputed OER); remove the regular continuity OER<sup>1</sup> for the period from July 1, 2003 through June 30, 2004 (second disputed OER) and direct that the concurrent OER for the same period replace the regular continuity OER; place him on the CWO promotion list consistent with his peer group; remove all references to his failure of selection for promotion from his record; and reinstate his criminal investigator CGIS (Coast Guard Investigation Service) program credentials. Generally, the applicant provided the following overview of his situation:

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<sup>1</sup> A continuity OER is submitted in cases where an OER is required, but full documentation is impracticable, impossible to obtain, or does not meet officer evaluation system goals. Article 10.A.3.c.5. of the Personnel Manual. Subsection d. further states that the supervisor shall briefly describe the reported-on officers responsibilities in section 2 and state the reason the continuity OER. All other evaluation areas are left blank with "Not Observed" marked for each dimension.

My personnel record includes a derogatory OER that I contest as unjust due to gross inaccuracies, improper processing, and conflict of interest held by the supervisor. The contested OER covers the period [June 1 2002 to June 30, 2003], while I was assigned as a special agent to CGIS xxxxxx. The contested OER has resulted in my failure of selection for promotion and it threatens to result in my separation from the Coast Guard. Judging from the many successes I had as a special agent, along with substantial positive feedback I had from my chain of command, my peers and agents in partner agencies, I was at the start of a promising career in the law enforcement and investigations specialty. As a result of being unfairly removed from my duties as a special agent and having the unjust OER entered into my record, I have been denied the opportunity to serve in the specialty. I was removed from my duties as a special agent for allegedly not following an order. I vigorously contest this allegation because I did comply with the order. I responded affirmatively to the RAC (resident agent-in-charge) regarding the order and engaged in normal supervisor/subordinate dialogue on the requirement and competing time demands. As it evolved, the RAC rescinded the order before the deadline for its competition. Nonetheless, I completed the necessary coordination to ensure the mission requirement was successfully met.

The first disputed OER for the period June 1, 2002, to June 30, 2003, was revised and placed in the applicant's service record on June 18, 2005. The revised OER was marked derogatory and the following statement was added in block 10 as directed by the PRRB (Personnel Records Review Board): "Failed to uphold the CG Core Value of Honor, Respect, and Devotion to Duty by blatantly disregarding CG Regulations and Policy."

The first disputed OER included numerous unfavorable comments as discussed later in this decision. The applicant's marks consisted of 2s in the workplace, judgment, and responsibility categories and marks of 3 in the planning and preparedness, adaptability, professional competence, looking out for others, developing others, directing others, teamwork, initiative, professional presence categories. He received marks of 4 in using resources, results/effectiveness, speaking and listening, evaluations, and health and well-being categories. The applicant received a mark of 5 in writing.

In block 10 where the reporting officer described the applicant's ability to assume greater leadership roles and responsibilities, the applicant was given a 2. The reporting officer wrote that the applicant failed to demonstrate the level of effective and supportive leadership expected of a commissioned officer. He further stated that the applicant lacked the potential for increased responsibility due to demonstrated failure to carry out lawful orders from supervisors and his lack of respect and trust for superiors in his chain of command. Finally, the reporting officer wrote that the

applicant "Failed to uphold the CG Core Value of Honor, Respect and Devotion to Duty by blatantly disregarding CG Regulations and Policy."

The reviewer for the OER attached comments, in which he fully concurred with the supervisor's and reporting officer's evaluation of the applicant's performance. The reviewer did not recommend the applicant's retention as a CGIS special agent, did not recommend him for promotion, and recommended that "a board be convened to consider revocation of [the applicant's] commission based upon CG Core Value violations."

The applicant submitted an addendum to the derogatory OER pointing out many of the contentions made to the Board. Each member of the rating chain endorsed the OER by forwarding it without comment.

## **ALLEGATIONS**

### **First Disputed OER**

With respect to the first disputed OER (June 1, 2002 to June 30, 2003) the applicant alleged that the Xxxxx office resident agent-in-charge (RAC), who signed the OER as supervisor was not in his published rating chain. The applicant stated that Chapter 2.E.2.b. of the Coast Guard Investigations Manual, listed the special agent-in-charge (SAC) as the supervisor for field units. He further stated that the SOP Number CGIS-xxxxxx for the xxxxxx region listed the SAC as the supervisor for the CWOs assigned to the unit. (At the time that that rating chain was published the applicant was a chief petty officer and was advanced to CWO2 in June 2002.) He noted that for the reporting period in question the SAC signed as the supervisor for a fellow CWO2 while the RAC signed as his supervisor. He further noted that although the Personnel Records Review Board (PRRB) obtained a July 31, 2002 email stating that the RAC was the rating chain supervisor for all assigned to that office, he was never informed of the change.

The applicant further alleged that the RAC should have been disqualified from serving on his rating chain because upon the applicant's relief from duties he had made reports of impropriety against the RAC. In this regard, the applicant stated that the allegations he made against the supervisor consisted of poor management practices, misuse of government vehicles, and a blatant disrespect for the uniformed Coast Guard. He argued that since the allegations he made against the supervisor questioned his ability as the RAC, the supervisor should have been disqualified because of his personal interest and conflict. He quoted Article 10.A.2.g.2.b. of the Personnel Manual, which states as follows:

Disqualified includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or a 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.

The applicant also alleged that his supervisor was a civilian hire from outside the Coast Guard and was not properly trained or certified as a civilian OES marking official, as required by Article 10.A.2.b.2.i. of the Personnel Manual. This provision states, "Civilians shall not be assigned to a rating chain before receiving OES training certification from Commander, (CGPC-opm) or Commander (CGPC-rpm) and having incorporated the OES rating chain responsibilities in their core competencies." In this regard, the applicant stated that the training the supervisor received in September 2002 was an overview of the OES and lasted only approximately 9 minutes.

The applicant asserted that the first disputed OER did not provide a complete picture of his performance for the entire rating period, and that the OER was unfair and written to support an unjustified decision to remove him from his investigator duties. In support of this contention, he stated that there is no mention in the first disputed OER of his participation in the Zone B-125 gasoline barge explosion, which according to the applicant was the biggest marine incident of the year in the Xxxxx Captain of the Port zone. He also stated that the OER does not mention his receipt of a Department of Justice Certificate of Commendation for his efforts on an environmental pollution case or his receipt of the Coast Guard Achievement Medal for his superior performance of duty during the terrorist attacks of 9/11.

*Applicant's Challenge to Specific Comments in the First Disputed OER*

**OER Comment:** In August 2002, [the applicant] was placed on a 45 day probation period due to his poor attitude and undermining of the new office supervisor and his practices. (The applicant responded that on August 13, 2002, two months into the evaluation period, he and the ranking military agent were placed on 45-days probation. He stated that he met with the special agent-in-charge (SAC) of the region who could not provide the applicant with any examples of documented performance lapses or unsatisfactory performance. According to the applicant, the SAC and told the applicant that the probation was not coming from him and therefore he could not offer an explanation for it. (The record indicates that the RAC initiated the probation, which was approved by the SAC.) The applicant alleged that during the reporting period he spoke with the SAC about the office dynamics and was given positive verbal and documented feedback and told to stick it out and keep performing at the same high level.)

**OER Comment:** The applicant was openly hostile to change and made every effort to negatively comment in the presence of subordinates, and CG members

**outside CGIS on new office expectations thus failing to promote good order and discipline.** (The applicant stated that if this statement were true, he is sure that he would have been counseled regarding such blatant disrespect for authority, yet there is no documented mention of this behavior. He stated that he personally acquired and delivered moving boxes for the RAC's move into a new residence on his own time and at his expense.)

**OER Comment:** In June 2002, the applicant boasted to others that the supervisor would not be around long. (The applicant denied that he made this statement.)

**OER Comment:** The applicant often lacked the tenacity and self confidence to make decisions and would frequently allow others to take the lead, failing to appreciate CGIS authority and jurisdiction. His disruptive attitude negatively affected his ability to carry out his primary duties. (The applicant stated that the comment is false and that he conducted numerous investigations across the spectrum of Coast Guard Investigative Service authority and jurisdiction to include the following: SAR Hoax, Mariner Document Seizure, Forgery, Self Inflicted Gunshot to Coast Guard member, Barge Explosion xxxxxxxxxx, Pollution (Oily Water Separator (OWS) Bypass), and Protective Service Operation during Commandant's official visit to xxx in December 2002.)

**OER Comment:** In April 2003, the applicant failed to follow an order to qualify 2 fellow agents for their Judgmental Pistol Certification (JPC) on baseless grounds. His insubordinate behavior caused his co-workers to make arrangements with an outside CG command in order to complete a mandatory training requirement. His lack of good judgment, poor leadership, and inadequate devotion to duty led to his removal from his primary duties with the CGIS program on May 15, 2003. (The applicant stated that on April 25, 2003, he received an email request from the RAC to administer the pistol test before April 30, 2003. He replied the next day, a Saturday, that he would not be able to administer the test until April 30th because of work commitments. He stated that he had an enormous amount of evidence seized during the execution of three search warrants earlier that needed to be processed expeditiously because some of the evidence was subject to a potential defense discovery request. The applicant stated that on Monday, April 28, 2003, the RAC informed him that he was "no longer qualified to conduct JPC for our office, so we will get someone else identified and trained." The applicant stated that he contacted another units JPC administrator to confirm availability to qualify agents before the end of April 2003.

The applicant submitted copies of the emails. The one from the RAC to the applicant, dated April 25, 2003, read as follows: "[R] and [N] need to get their JPC completed before 30 April. Let them know what day/time you want them before Wednesday to knock it out." The applicant responded by email to the RAC with the

following: "Not going to be able to get to that before Wednesday. I am going to be extremely busy with access to the barge debris field becoming a issue that will be very time consuming. Not to mention the evidence taken last week needs to be accessed for content and copies for [B] made as needed." The applicant further stated the following in the email:

Regarding the conversation we had two weeks ago, has anyone been identified in the region who has actually been trained in the use of force as an instructor. These folks need to be identified as soon as possible. Be aware that the Judgmental Course has a lot of articulation written into it and I think it is a good idea that the troops be advised to make sure they are familiar with the verbiage associated with the use of force policy.

On April 28, 2003, the RAC responded to the applicant's email stating the two agents in need of JPC would get it completed by someone else and that the supervisor had informed xxxxx that the applicant was no longer qualified to conduct JPC training for the office and that someone else would be identified and trained.

**OER Comment: His poor attitude significantly affected the morale in the office and forced divisions between agents, thus affecting the overall operational effectiveness of the office.** (The applicant stated that this comment is vague and unsupported. He stated that he was never received any feedback in this area even during the probationary period.)

**OER Comment: The applicant rarely assisted other agents in the office and would offer guidance as an experienced agent only when asked. An experienced and senior military agent, he failed to take an active role and integrate himself in daily operations of the office.** (The applicant stated that he directly managed 12 Reserve Special Agents, scheduling their drills and ADTs to match the operational tempo of the RAO and he increased reserve productivity. He stated that he provided computer assistance and support to all agents increasing agent productivity and efficiency. He stated that he also provided routine troubleshooting of computer problems to eliminate the time consuming task of engaging Electronics Support Detachment to repair minor faults.)

**OER Comment: Overall, the applicant showed very poor leadership traits by not supporting and demonstrating trust and confidence in his superiors and not using the chain of command properly.** (The applicant stated that this comment is vague and unsupported by examples of fact.)

**OER Comment: When sent TAD, the applicant was ordered to report in CG Uniform on May 19, 2003 to XO of TAD unit instead the applicant failed to follow the order and reported in civilian attire.** (The applicant stated that he had a conversation

with the Deputy on May 15, 2003 and was told that civilian attire would be acceptable for reporting. He indicated that he needed to purchase new uniforms because he could not find an acceptable uniform of the day among his stored items after over two years serving out of uniform.)

**OER Comment:** Three co-workers advised the chain of command that the applicant alluded to the conflict between himself and the supervisor as a game and if the supervisor was to initiate action against him he would not go down alone. The applicant voiced to a co-worker that he intended to accomplish the training on JPC and that he wanted to see how upset the supervisor would get. The applicant had the potential to become a highly effective investigator and leader in the CGIS organization had it not been for his poor attitude and disruptive behavior. (The applicant stated as follows: "To take allegations such as these, stow them away and use them without first confronting the individual involved again reflects upon the abilities of the supervisor and/or the truth of these allegations." Working for this supervisor was no game. Others and myself were constantly threatened individually and collectively with relief of duty. One agent had already been relieved and the supervisor made no secret that a fellow CWO or I were next. "The Supervisor made it abundantly clear that he would 'fire' anyone who got out of line. I would certainly like to ask these three co-workers when and where these discussions took place.")

**OER Comment:** The applicant failed to use the appropriate chain of command to voice his discontent and instead chose to conduct himself in a manner not consistent with the proper conduct of an officer. When sent TAD, the applicant further demonstrated his inability to adhere to CGIS policy contained in Article 7-M, COMDTINST M5527.1B (CGIS Investigation manual) on the procedures to follow for an internal affairs investigation when concerns arose involving his perceived unethical misconduct of other agents. The applicant revealed via e-mail to SAC, xx Region that he collected notes related to his supervisor and co-workers activities dating back to October 2002, and audio recordings. Over an extended period, the applicant made audio recordings between himself and other agents in the office without their consent in direct violation of CGIS policy contained in Article 7-V of COMDTINST M5527.1B. The applicant's self serving and illegal audio recordings were conducted without the approval of his chain of command. His supervisor directed him to turn in his office keys prior to departure on his administrative TAD assignment. In a final act of insubordination, he stated to his supervisor "take it easy big boy" and left without surrendering his keys. (The applicant stated that he did use the chain of command by complaining to the SAC, who told him that the RAC was young and inexperienced and should be given time. "I did not make recordings over an extended period of time. Given the lack of support from the chain of command, I did attempt to capture on tape the disrespectful tone and statements of the RAC. I did not persist in this and only taped for a very brief period. Upon my departure, I left the tape with CGIS on my own initiative. The statement regarding the keys is yet another

fabrication to fill empty space in this OER. I did in fact return my keys as witnessed by the agent I was working with at the time.")

## **Second Disputed OER**

In objecting to the regular continuity OER (July 1, 2003 to June 30, 2004), the applicant again alleged that the supervisor was disqualified from serving in his rating chain. He further alleged that the following comments in block 2. of the OER are in violation of Article 10.A.4.f.11 of the Personnel Manual<sup>2</sup> because they refer to performance that occurred during the previous reporting period:

SPECIAL AGENT. Administratively assigned TAD to CG Xxxxx on 2003/05/19, 365 days not observed this reporting period. As a result of misconduct relating to [the applicant's] unauthorized recording of conversations of co-workers, member's command has made, during this period, a contemporaneous management decision not to allow his return to CGIS Xxxxx. Command has concluded that it is in the best interest of the Coast Guard that [the applicant] be permanently transferred from CGIS Xxxxx and re-assigned to a non-CGIS position.

The applicant stated that it was the intent of his command not to have him return to duty at CGIS at the point of his removal from duty as a special agent. As evidence of that intent, the applicant noted that the first disputed OER showed 49 days of non-observed performance for "other reasons." He also noted that the reviewer recommended that the applicant not be retained as a special agent. In addition, he argued that the two excellent OERS he received in his TAD assignment are tarnished by the alleged improper comments in block 2 of the second disputed OER and his continuance in a TAD assignment. The applicant complained that he has been serving in a TAD assignment for approximately three years.

### *Statements in Support of the Applicant*

1. A senior chief investigator who worked with the applicant during the period in question corroborated the applicant's allegation that the supervisor's mismanagement of the office created a demoralizing, negative, unwholesome, and threatening atmosphere. He further contended that the supervisor had given free rein to certain individuals who proceeded to unfairly attack and undermine the applicant. "This was because of their jealousy for the commendable job the applicant did and the praise he received." According to the senior chief, the supervisor appointed professional "fault finders" to help him carry out and maintain control of the

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<sup>2</sup> This provision of the Manual states the rating chain shall not discuss an officer's performance or conduct that occurred outside the reporting period.



threatening atmosphere that he had created from the very first staff meeting he conducted. The senior chief stated that as leverage the supervisor constantly threatened to end and/or not renew periods of extended active duty, using active duty contracts as "carrots" dangled in exchange for loyalty and blind devotion."

2. A chief who worked with the applicant from April 2001 until May 2003 wrote that based upon his 21 years as a criminal investigator, he found the applicant to be exceptional both as a Coast Guard officer and as a criminal investigator. He further stated the following:

I must say that I was shocked and confused when the applicant informed me he was no longer an agent with CGIS. I was even more confused when I learned of the reason why. Having worked along side the applicant for hundreds of hours, it was inconceivable that this individual could be relieved of duty for not administering a judgmental pistol. Our workload was so great that during the month this request took place, that together we had logged over 160 hours of overtime. I was present when the applicant contacted xxxxx JPC Administrator . . . in person to ensure the agents requiring the training could get it from xxxxxx personnel before the expiration of their qual[ification].

3. The applicant provided a statement from another CWO2 who worked with him at the unit and who was placed on probation twice during the reporting period. He stated that neither his failure to be selected for CWO3 nor that of the applicant was due to performance issues but rather due to a personality conflict with the RAC. He stated that prior to the arrival of the RAC he was a high performer, just like the applicant. The CWO2 stated that he was accused of going to the movies during the work day when in fact he was working on a significant case that resulted in the longest jail sentence ever given to a hoax caller. Further, he stated that the RAC accused him of asking for a letter of appreciation from the Secret Service. This CWO2 stated that

I was assigned with the applicant during the entire time he was detailed to the RO Xxxxx. The applicant was constantly [called] upon to assist other agents in the daily performance of their duties and he did so eagerly. The applicant was responsible for a 12-person reserve component comprised of a wide variety of civilian law enforcement personnel. The applicant handled these reserves in a very professional manner and utilized their knowledge to the maximum extent. The applicant and I were involved assisting rescuers after the attacks on 9/11. The applicant commandeered donated water trucks and we delivered thousands of bottles of water to the rescue workers during the night of 9/11.

## *Personnel Records Review Board (PRRB)*

Prior to filing his application with the Board, the applicant asked the PRRB to remove the first disputed OER for the period June 1, 2002 through June 30, 2003 from his record, or in the alternative, mark it as derogatory so that he could submit an addendum. The allegations made before the PRRB were similar to those made before this Board. The PRRB denied the applicant's request for removal of the OER but ordered it to be marked derogatory. Of particular note, the PRRB made the following findings:

3. The applicant provided contradictory and troubling evidence regarding his request to have the following OER comment removed: "In April 2003, [the applicant] failed to follow an order to qualify 2 fellow agents for their Judgmental Pistol Certification (JPC) on baseless grounds." Applicant requested redaction of the comment due to his lack of CGJUFE, CGJPC, and CGSAI certification and training. [T]he applicant was required to have written certification by the command prior to conducting CGJUF training . . . [and] the applicant was required to have attended CGSAI training prior to conduct CGJUFE training. No such certifications were found in applicant's PDR. In addition applicant states that he never received written certification by CGIS as a CGJUFE administrator, nor has he completed required CGSAI training . . . However [in another document] the applicant states that he voluntarily conducted Use of Force certification training at three separate units to relieve the RAO xxxxx of that task. These contradictions are particularly troubling. Applicant held himself out as qualified to conduct the training in question and sought credit for doing so on his own time. Based on this, it was entirely reasonable for his supervisor to believe applicant was doing so within the bounds of Coast Guard regulations. When Applicant decided to disobey the order to provide additional training, it was incumbent upon applicant to advise his command of his reason for refusing to obey the order. Applicant did not do so. According to his Supervisor, Applicant never provided any articulate reason for his refusal to train other agents as ordered. Applicant certainly never told his Supervisor that he was not qualified to conduct the training. Applicant cannot now offer a post-hoc rationalization for his failure to obey what was on its face a lawful order.

[T]he Block 3 OER comment, "His lack of good judgment, poor leadership, and inadequate devotion to duty led to his removal from primary duties with the CGIS program on 15 May 2003" makes the OER a derogatory report. The applicant was not afforded the opportunity to comment on his performance and/or conduct through an addendum. All other

comments are sufficiently supported and in the spirit of the OES (officer evaluation system).

The PRRB made the following recommendations:

1. Grant Applicant's request for relief by amending his OER. Recommend the unit resubmit the revised OER as a Derogatory report per procedures outlined in Article 10.A.4.h.
2. Ensure the necessary paperwork is generated in order to certify [the RAC] as qualified to serve as a supervisor in the OES. [RAC's] certification should indicate the earliest date upon which [the RAC] was so qualified.
3. Recommend the unit incorporate a breach of core values statement in block 10 of the revised Derogatory OER.
4. Recommend the unit conduct an administrative investigation concerning the circumstances of Applicant's providing training without proper credential and subsequent failure to inform his command when he discovered this error.
5. Grant no other relief.

The Deputy Director of Personnel Management approved the PRRB recommendations on April 15, 2005.

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

On July 3, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG adopted the facts and analysis provided by the Commander, Coast Guard Personnel Command (CGPC) and asked the Board to accept them as the advisory opinion.

CGPC stated that there was an official change to the applicant's rating chain on July 31, 2002. On this date, an email from special agent R to special agent D and SSA M stated that the supervisor had changed from the SAC to the RAC. The RAC signed as supervisor on the applicant's OER. CGPC, quoting the reviewer stated as follows: "[T]he Coast Guard Investigative Service . . . was undergoing a significant reorganization during that time period and, although the immediate changes to all publications were not promulgated to document the on-going changes, the organization

would be 'at a standstill if this technicality were allowed to prevent a designated supervisor from rating his or her subordinate.'"

CGPC stated that the reporting officer and reviewer stated that the supervisor demonstrated the requisite skills and experience to fairly evaluate military and civilian personnel assigned to the Xxxxx CGIS office, and noted that the failure to certify the supervisor's OES training was an administrative oversight. CGPC stated that there was an inquiry into the applicant's allegations of impropriety against the supervisor and no evidence was found to substantiate them.

CGPC stated that the OER for the period July 1, 2003 through June 30, 2004 was prepared by the supervisor, validated by CGPC and entered into the official record on January 18, 2005. The concurrent OER for the same time period was prepared by Xxxxx xxxxxxxxxx and validated by CGPC and entered into the official record on November 22, 2004.<sup>3</sup>

CGPC obtained sworn statements from each member of the rating chain. The pertinent details of each are discussed below.

1. The supervisor addressed the applicant's allegation that the supervisor should have been removed from the rating chain because of the applicant's allegations of malfeasance against the supervisor. The supervisor responded that since the applicant's probation and disciplinary problems occurred before his removal from duty as a CGIS agent there was no basis for the supervisor's recusal. The supervisor stated that the allegations were made by the applicant upon his removal and were found to have no merit.

The supervisor stated that the applicant was removed from duty because he broke a major tenet of USCG Core Values and professional behavior expected of a federal law enforcement officer. In this regard, he secretly audio-taped his fellow agents in hope of getting information that could lead to my dismissal. He noted that the applicant refused to obey a direct lawful order to conduct JPC training as the supervisor directed via e-mail and face-to-face.

The supervisor stated that almost immediately upon his arrival, the applicant began a campaign to undermine his policies and vocalize his extreme dissatisfaction to

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<sup>3</sup> Article 10.A.3.c.2. of the Personnel Manual defines a concurrent OER as a report submitted in addition to a regular or special OER. A Criterion for the submission of a concurrent OER is the performance of temporary assigned duty (TAD) away from the permanent station for at least 60 consecutive days while being observed by a senior other than the regular reporting officer. This provision tasks the applicant's permanent unit with the responsibility for maintaining continuity through submission of regular or special OERs. (When this occurs, a member will have both a regular OER, normally performance is not observed and a concurrent with observed performance.)

subordinates. He stated that many of the applicant's complaints resulted from the supervisor's new office policy for core hours and dress and appearance requirements. He indicated that prior to his arrival the office had virtually no management or leadership.

2. The reporting officer wrote in his sworn statement that the recommendations of the independent PRRB resulted in a revision of the applicant's OER to further reflect the derogatory nature of the report and to include his breach of the Coast Guard Core Values. The reporting officer stated that the supervisor was qualified to serve on the rating chain and that he had received the requisite OES training. He stated that the applicant's inability to adhere to the Coast Guard Core Values of Honor, Respect, and Devotion to duty should cast serious doubt as to his ability to serve as an effective military officer.

3. The reviewer stated in a sworn statement that he believed that the supervisor was qualified to serve as reviewer in the OES system. He stated that his staff reported to him that the applicant was consistently insubordinate to his new supervisor, and engaged in nonconsensual recording of internal officer conversations, allegedly, as a means to defend himself against other unspecified allegations. The reviewer further stated as follows:

I was so concerned about the applicant's behavior toward his supervisor that I considered whether the facts established . . . provided a basis for a command-directed mental health evaluation . . . I didn't want someone with possible mental health issues doing harm to others or himself, so he was asked to get a voluntary evaluation from EAP and a mental health specialist, which he did on his own. Essentially, [the applicant] simply refused to develop a positive working relationship with his new supervisor, which affected his performance. So in my opinion, the OER should stand.

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

On August 1, 2006, the Board received the applicant's reply to the views of the Coast Guard. He provided the following comment:

I was never asked to engage the Coast Guard Employee Assistance Program (EAP) to address perceived mental health issues by any member of the Coast Guard. I immediately engaged the EAP at both Xxxxx and xxxxxxx to address my situation solely as related to my removal from duty. Coercive threats made when asked to voluntarily resign from CGIS, specifically to "think of my family" and "go quietly or have my career damaged by a bad OER", caused me to seek advice through EAP.

I have never in my 20-year career (or my life) sought or received care, evaluation, or treatment, from any member of the mental health profession.

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

3. The applicant is correct that the rating chain as published on February 2002 designated the SAC as the supervisor. However, an email dated July 2002 addressed to a special agent other than the applicant stated that the rating chain had been modified to designate the RAC Xxxxx position as the supervisor for individuals assigned to RAO Xxxxx. There is no evidence if and when this change to the rating chain was published to the unit. However, even though the modification to the rating chain may not have been published widely, the applicant could not have been misled or confused as to the identity of his supervisor. In this regard, the Board notes that the supervisor placed the applicant on probation in August 2002 and his name was in fact listed on the counseling document as the supervisor, which the applicant acknowledged. The applicant did not challenge the designation of his supervisor at the time of placement on probation and in fact did not do so until he received the derogatory OER. Accordingly, the Board finds that even though the modification to the rating chain may not have been published timely and widely, the Board concludes that the applicant knew that the RAC was his rating chain supervisor as early as August 2002.

4. Article 10.A.2.b.i. of the Personnel Manual states that commanding officers are to ensure that civilian employees who must perform the duties of either a supervisor or reporting officer have obtained formal training from Commander CGPC. The provisions further states that civilians shall not be assigned to a rating chain before receiving OES training certification from CGPC and having incorporated the OES rating chain responsibilities in their core competencies. In his statement to CGPC, the supervisor stated that he did not receive OES training until September 2002 and the PRRB admitted that he had not received his OER training certification document when it issued its decision in April 2005. The Coast Guard appears to have violated the

Personnel Manual by assigning the RAC as the applicant's rating chain supervisor without having certified his OES training. The PRRB found this to be an administrative oversight. Failing to complete the paper certification of the training may have been an oversight, but the designation of the RAC as the applicant's supervisor before he received any OES training appears to be a violation of the Personnel Manual, which states that civilians shall not be assigned to a rating chain before receiving OES training certification. In this regard, the Board notes that the RAC was designated supervisor in July 2002 and did not receive OES training until September 2002. The question for the Board is whether this violation of the Manual was prejudicial to the applicant. The Board finds that the applicant has submitted insufficient evidence to show harm. The Board notes that the supervisor received OES training approximately six weeks after his designation to the rating chain and well in advance of the end of the reporting cycle on June 30, 2003.

5. The applicant has not proved that the supervisor should have been disqualified from the rating chain. Although the applicant alleged that the supervisor had engaged in some impropriety during the rating period, the SAC of the xxxxxxxx region closed the matter after interviewing both the applicant and the supervisor on June 12, 2003. Mere allegations against a rating chain member are insufficient to cause a disqualification under Article 10.A.2.g.2.b. of the Personnel Manual, which states as follows:

Disqualified includes relief for cause due to misconduct or unsatisfactory performance, being an interested party to an investigation or a 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.

There is no evidence in the record that the supervisor was relieved for cause, was an interested party to an investigation, or was in any other situation that raised a question as to whether he could fairly evaluate the applicant. The Board notes that allegations were not made against the supervisor until after the applicant had been relieved of his duties on May 15, 2003.

6. The applicant complained that the first disputed OER did not include any of the twenty-seven pages of accomplishments that he provided to the supervisor. However 10.A.4.c.4.d. of the Personnel Manual states that the supervisor shall include comments citing specific aspects of the Reported-on Officer's performance and behavior for each mark that deviates from a 4. The rating chain complied with the regulation by providing comments to support the below average marks of 2 and 3 and the above average mark of 5 in writing.

7. The applicant offered challenges to each of the negative comments in the OER. However only one comment merits further discussion, which is the comment that "[the applicant] failed to follow an order to qualify 2 fellow agents for their Judgmental Pistol Certification (JPC) on baseless grounds. His insubordinate behavior caused his co-workers to make arrangements with an outside CG command in order to complete a mandatory training requirement." The applicant denied that he refused to do the training and argued that he suggested another date on when he could do the training. However the applicant's email response to the supervisor's request did not suggest an alternative date and stated flatly that the applicant was not able to do the training by the date designated by the supervisor. The applicant also argued that he was not able to do the training by the date requested because of his workload. Presumably, the supervisor who had overall responsibility for management of the office was aware of the applicant's workload when he told the applicant to do the training by a date certain. The applicant should have obeyed the order from the supervisor.

The Board notes that the applicant's reply email to the supervisor about the training also contained the comment "Regarding the conversation we had two weeks ago, has anyone been identified in the region who has actually been trained in the use of force as an instructor," suggests that an earlier conversation had occurred between the applicant and supervisor on this matter. The supervisor's reply email confirms that an earlier conversation about use of force instructors had occurred because the supervisor commented that he had informed XXXX that the applicant was no longer qualified to conduct the training. The Board is unable to tell from these emails whether the applicant was refusing to do the training because of concerns about his qualifications or lack thereof. Therefore, the Board finds the evidence insufficient to prove the inaccuracy of the comment that the applicant failed to follow an order to qualify fellow agents.

8. The applicant also complained about the fact that the OER does not mention his receipt of a national Department of Justice Certificate of Commendation for his efforts on environmental pollution case involving the Xxxxx or his receipt of the Coast Guard Achievement Medal for his superior performance of duty during the terrorist attacks of 9/11. The applicant's Achievement Medal is dated August 2002 and is filed in the applicant's military record. Article 10.A.4.c.3. of the Personnel Manual allows for the attachment of personal awards to an OER during the period received, even if the performance cited does not relate to the period. The Achievement Award is dated August 12, 2002, but there is no indication in the record when it was actually delivered to the applicant. Nor is there any evidence that the applicant called his receipt of the award to the attention of his supervisor. Therefore, the evidence on this issue is insufficient to establish an error on the part of the supervisor. Moreover, any error that may have existed by failing to attach the Achievement Medal to the OER for the period June 1 2002 to June 30, 2003 is considered harmless since the Achievement Medal is properly filed in the applicant's military record. The applicant has not established that



the Department of Justice Certificate of Commendation is the type of award that could be attached to the OER. Accordingly, the Board finds no error or injustice in not attaching the Justice Certificate to the first disputed OER.

9. The applicant challenged the content of the first disputed OER before the PRRB and requested its removal from his record or in the alternative to have it amended by marking it as a derogatory OER so that he would have the right to submit an addendum, which should have been done initially since the OER documented the applicant's removal from his primary duty. See Article 10.A.4.h.1. of the Personnel Manual. The Board questions whether the PRRB in telling the rating chain to mark the OER as derogatory committed an error and/or injustice by also ordering the reporting officer to include a comment that the applicant had breached the Core Values of the Coast Guard in the block 10. of the OER. Apparently, the reporting officer revised the sentence "The applicant has failed to uphold any of the CG core values" to read in the revised OER "Failed to uphold the CG Core Value of Honor, Respect, Devotion to Duty by blatantly disregarding CG Regulations and Policy."<sup>4</sup> The Board further notes that the reviewer added additional negative comments to the reviewer comment page after the PRRB directed the rating chain to mark the OER as derogatory. The reviewer apparently added the following comments to his page after the PRRB review: "Not recommended for retention as a Special Agent. Not recommended for promotion with his peers. Recommend a board be convened to consider revocation of his commission based upon CG Core Value Violations."

The reporting officer acknowledged in his statement to CGPC that the PRRB "recommendation . . . resulted in a revision of the applicant's OER to further reflect the derogatory nature of the report and to include his breach of the Coast Guard Core Values." The Board finds nothing in the PRRB instruction that specifically prohibits it from adding to an OER. However to do so without the request of the applicant appears to be an injustice, particularly when the additional language is prejudicial. Commandant Instruction 1070.10C (PRRB Instruction) states that the purpose of the PRRB is to recommend appropriate action on applications for correction or relief from error in the records of Coast Guard Personnel. The additional derogatory language expressed the sentiment of the members of the PRRB, who were not members of the rating chain. Although the additional language was a PRRB recommendation, once it was approved it became an order to the rating chain to add the language. If the Personnel Manual prohibits a reporting officer from directing a supervisor and the reviewer from directing a reporting officer on how to change an OER that is returned, it would be a contradiction of those principals to allow the PRRB to order changes to an OER, unless such changes are at the request of the applicant. The Board will not decide

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<sup>4</sup> The administrative Investigation into the applicant's misconduct contained a copy of what the Board believed to be the original OER. The reviewer signed the original OER on January 20, 2004 and he signed the revised OER on July 13, 2005.

the issue of whether the additional PRRB language or the additional reviewer comments are in error or unjust because the applicant did not raise the issue and the Coast Guard did not address it. However, the Board would entertain a request from the applicant for further consideration on this issue should he present it to the Board, but cautions that further review of the issue may not result in a grant of relief.

10. With respect to the second disputed OER, which is a regular non-observed OER for continuity purposes for the period July 1, 2003 to June 30, 2004, the applicant complained that the comments below violated Article 10.A.4.f.11 of the Personnel Manual because they refer to performance that occurred during the previous reporting period:

SPECIAL AGENT. Administratively assigned TAD to CG Xxxxx on 2003/05/19, 365 days not observed this reporting period. As a result of misconduct relating to [the applicant's] unauthorized recording of conversations of co-workers, member's command has made, during this period, a contemporaneous management decision not to allow his return to CGIS Xxxxx. Command has concluded that it is in the best interest of the Coast Guard that [the applicant] be permanently transferred from CGIS Xxxxx and re-assigned to a non-CGIS position.

The Board notes the Coast Guard's failure to address the issue of whether the comments violate the Personnel Manual. However, the Board agrees with the applicant and finds that the date of his TAD assignment on May 19, 2003 and the misconduct mentioned in block 2. occurred during the pervious reporting period, and therefore violates the Personnel Manual. To allow it to remain as part of the explanation for the submission of the regular continuity OER serves to punish the applicant twice for the same offense. The applicant's misconduct is thoroughly discussed in the previous OER. Therefore, block 2. of the second disputed OER should be rewritten as follows:

SPECIAL AGENT. TAD to CG Xxxxx, 365 days not observed this reporting period. During this period, command has concluded that it is in the best interest of the Coast Guard that [the applicant] be permanently transferred from CGIS Xxxxx and re-assigned to a non-CGIS position.

11. Having found error in the regular continuity OER, the Board must determine whether the applicant's 2005 and 2006 failures of selection for promotion to CWO3 should be removed. In deciding this issue the Board applies the test in *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982). In *Engels*, the Court of Claims held that, if the Board finds that an officer's record contained an error when it was reviewed by a selection board, the Board should decide whether the officer's failure of selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it

would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?"

12. The Board finds that the applicant's record did not appear worse with the mentioning of the restricted comments in the second disputed OER. The Board further finds that even if there was some slight prejudice, it is unlikely that the applicant would have been promoted in any event. In this regard, the Board notes that the previous OER discusses the applicant's behavior and misconduct at length, recommends against promoting him, and recommends the revocation of his commission. In light of these damaging assessments, it was unlikely that the applicant would have been promoted even if the regular continuity OER had not mentioned the misconduct in block 2. (description of duties).

13. The Board has considered all of the applicant's contentions. Those not discussed within the Findings and Conclusions are considered to be without merit or not dispositive of the issues in this case.

14. Accordingly, the applicant's request should be denied except for the removal of comments from the regular continuity OER discussed in Finding 10 above.

**ORDER**

The application of xxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied, except that the comments in block 2 (description of duties) on the regular continuity OER for the period July 1, 2003 to June 30, 2004 shall be rewritten as follows:

SPECIAL AGENT. TAD to CG Xxxxx, 365 days not observed this reporting period. During this period, command has concluded that it is in the best interest of the Coast Guard that [the applicant] be permanently transferred from CGIS Xxxxx and re-assigned to a non-CGIS position.

No other relief is granted.

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David Frost

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Patrick Kernan

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Darren Wall