

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-104

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This is a proceeding under 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 April 28, 2006, upon receipt of the completed application.

This final decision, dated January 11, 2007, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his military record by changing two numerical marks and two comments in his officer evaluation report (OER) for the period June 1, 2002, through June 27, 2003. The disputed OER is the second he received while serving as the executive officer (XO) of a buoy tender with a crew of 49 officers and enlisted members. The applicant asked the Board to

- (a) raise his mark for "Professional Competence" from 4 to 6;¹
- (b) replace the supporting comment "Continued to develop cognitive perception to react, maneuver single screw ship" in block 3 with the comment "Confident, highly skilled ship handling and seamanship in demanding conditions";
- (c) replace the comment "Enjoys being at sea; recommended for continued sea service as XO of WHEC/WMEC" in block 10 with the comment "Has earned my highest recommendation for immediate command afloat of a WLB, WTGB w/ barge or WPC"; and
- (d) raise his mark for "Evaluations" from 4 to 5 or 6.

¹ In OERs, Coast Guard officers are evaluated on their performance in various categories, such as "Judgment" and "Using Resources," on a scale of 1 to 7, with 7 being the highest possible mark.

As a less preferred, alternative correction, the applicant asked the Board to remove the entire OER from his record.

The applicant alleged that soon after he reported aboard the tender in June 2001, he informed the commanding officer (CO) that his primary professional career goal was to be recommended for command afloat and to be assigned as the CO of a cutter once he was promoted from lieutenant to lieutenant commander. (The applicant was selected for promotion in August 2001 but was not promoted to lieutenant commander until July 1, 2003.) In his first OER from the CO, she acknowledged his career goal by writing that he was "progressing well, expect to offer recommendation for command afloat during his next marking period."

The applicant stated that during his second year on the buoy tender, the crew had many operational successes. As shown on the disputed OER, he himself "had deck or conn for 63 buoy evolutions, 13 moorings, moored ship in challenging 20 kt off-dock wind conditions. Gained valuable experience during 31 ice breaking missions in worst ice conditions on ... in 25 years." The CO had designated him as the coach of all deck watch officers and of those in training to be deck watch officers. Moreover, following inspection, the cutter was evaluated as satisfactory in its administration, personnel, and financial management, and the crew received an Operational Readiness Award and a Meritorious Unit Commendation. Therefore, since his CO never warned him that she did not intend to recommend him for command afloat, he felt "confident going into my final OER counseling session that I would be recommended for command."

The applicant stated that on his last day on the buoy tender, he asked his CO if he could see his OER. At first she said the OER was at home but, when he offered to come by later, stated that she had already submitted it to the District office and asked him what he wanted to know about it. Therefore, he asked her what comments she had made about his leadership potential, and she admitted that she had not included a specific recommendation for command afloat. The applicant alleged that the CO had said nothing to him during the evaluation period about not recommending him for command afloat and would have taken action to correct any deficiencies had she warned him instead of waiting till the last day he was aboard. He stated that it is common practice for COs to warn their subordinates of perceived shortcomings so that they may try to improve and that the Personnel Manual requires such feedback.

The applicant alleged that when he asked the CO why she had not recommended him for command afloat, she told him that (a) he was "too principled," (b) he did not "fit in," and (c) he "like[d] to wear the labels of cutterman and XO." She did not criticize his ship handling, seamanship, or leadership. The applicant alleged that none of the "typical reasons" for a CO not to recommend an XO for command afloat existed, such as inferior ship handling, seamanship, or leadership; grounding, colliding, or otherwise damaging the ship; having an inappropriate relationship; losing government money or property; or violating policies or the Uniform Code of Military Justice. He alleged that the CO further told him that she ascribed the ship's successes to the efforts

of herself and other officers as his “role was marginal, supported by strong subordinates who essentially covered for [him].”

The applicant alleged that when the CO referred to him as being “too principled” (in the OER, she described him as “firmly principled”) she was denigrating his Christian faith and his ban on pornography in the common areas of the ship. He noted that during a meal in the wardroom, she once joked “about her ‘enjoyment of a good issue of Playgirl magazine every now and then.’” He stated that such a comment would have received an immediate reprimand had a senior male officer joked about enjoying Penthouse magazine in a wardroom full of junior female officers. The applicant alleged that when he asked what she meant when she said he did not fit in, she would not explain.

The applicant alleged that at one point in the discussion of the disputed OER, the CO told him “at least you still have your family.” He alleged that the CO would have been firmly reprimanded had the situation been reversed—i.e., had a male, unmarried CO said such a thing to a married, female junior officer. The applicant stated that during the counseling session, he “felt betrayed, insulted, and lied to in a cowardly fashion.”

The applicant alleged that the CO’s decision to make him the coach for all deck watch officers was inconsistent with the mark of 4 she assigned him for “Professional Competence.” He argued that she would not have appointed him to train deck watch officers during the most difficult ship handling evolutions if she did not, in fact, trust him to handle the single screw ship. He also argued that the mark of 4 for “Professional Competence” and the lack of a recommendation for command afloat are inconsistent with the end-of-tour Achievement Medal she awarded him. The applicant further argued that the OER input he provided to the CO would amply justify a higher mark of 6 or at least 5 for “Professional Competence.” He alleged that he was amply qualified and prepared to assume command of a ship. He noted that the CO’s failure to recommend him for command afloat is inconsistent with the recommendations he received from prior and subsequent COs.

The applicant stated that after speaking with the CO, he addressed his concerns with the OER reviewer at the District office and the afloat detailer. However, they refused to ask the CO to revise the OER.

The applicant alleged that because of the lack of a recommendation for command afloat in the disputed OER, subsequent Junior Command Afloat Screening Panels have not selected him for command. He alleged that his career has been delayed six years because since leaving the buoy tender, he has spent four years as an Area force readiness branch chief and will begin another tour of duty as an XO in 2007.

The applicant alleged that the reason the CO never counseled him about any performance deficiencies was because there were, in fact, no such deficiencies that would

justify not recommending him for command afloat. Regarding the CO's motive for unjustifiably not recommending him, the applicant cited four possibilities:

1) The prior XO, whom the CO had recommended for command afloat, was given command of a 140' WTGB and later relieved of command for cause. The applicant alleged that the investigation blamed the CO, in part, for having recommended the prior XO for command. He alleged that the investigator reported that the prior XO "had not been sufficiently trained and prepared for command by his CO." Therefore, the CO felt pressure not to recommend the applicant for command.

2) The applicant alleged that he was an "easy target" since he had never served on a black hull buoy tender before and had previously received one poor OER due to the grounding of his prior ship.

3) The applicant's wife gave birth to twin sons during his tour on the buoy tender and he "was able to be a successful husband and father all while being a successful cutterman." The applicant alleged that when he was showing ultrasound pictures of the twins to fellow officers, the CO refused to look at them. The applicant also alleged that the CO was displeased that married members receive a bigger housing allowance than do unmarried members and was displeased when he voiced his approval of the policy.

4) The CO, although selected for promotion to O-5 in 2002, was passed over for promotion in August 2001, and the "psychological effect of this [was] that she became much more willing to negatively impact another officer's career, having recently suffered a significant career setback herself."

The applicant alleged that his CO's failure to recommend him for command and assignment of the mark of 4 for "Professional Competence" are ironic because he twice corrected her, in private—once when she said that the "quality of fix" was not a part of a standard navigation evolution and another time when she did not know how to maneuver the ship during a man overboard drill. In addition, she received the lowest grade (80%) during a navigation rules quiz administered by a visiting Afloat Training Group. He alleged that the disputed OER has caused him "unwarranted professional humiliation and embarrassment" by preventing his selection for command afloat.

Regarding the mark of 4 for "Evaluations," the applicant alleged that it should be raised to a 5 or 6 because the CO "often asked me to help her write her sections of OERs for other officers. I would sit beside her in the cabin and help her with sentence structure, word selection, and proper grammar."

The applicant alleged that he asked six fellow officers on the buoy tender to write statements on his behalf but all but one refused due in large part to their fear of future retribution by the CO. The lieutenant who did write for the applicant stated the following:

I served as the Operations Officer and Training Officer aboard the [buoy tender] during the period 2002/01/02 to 2003/06/30. During this time I observed [the applicant] demonstrate both astute leadership qualities and adept ship handling skills.

[The applicant] was instrumental in imparting his ship handling and seamanship skills to break-in Deck Watch Officers assigned to the ship. His efforts directly resulted in the Underway Deck Watch Officer qualification of four junior officers, including myself, as well as the qualification of one senior petty officer.

In addition, as the Executive Officer, [the applicant's] overall supervision and coordination of the cutter's on-board training teams and the bridge navigation team were instrumental in the [cutter] receiving the coveted Coast Guard "E" ribbon during the cutter's 2002 refresher training.

Not only was [the applicant] looked upon as a leader and mentor aboard the cutter, [he] was often the "go-to" ship driver during particularly complex maneuvering evolutions. [He] was called upon several times to conduct [aids to navigation], mooring, and underway evolutions where other Deck Watch Officers' abilities were questioned or had failed. [He] was completely trusted with the safety and well-being of the cutter and crew in the most arduous situations.

Based upon my observations, there is nothing lacking in [the applicant's] knowledge, ship handling, and leadership abilities that would preclude him from serving in a command afloat assignment. Rather, based upon my limited experience, what I've witnessed of [his] abilities would serve as qualifications toward a command afloat assignment.

SUMMARY OF THE APPLICANT'S MILITARY RECORD

On May 20, 1992, the applicant received his commission as an ensign. From May 1992 through June 1994, he served as a deck watch officer on a medium endurance cutter. On his OERs, his commanding officer strongly recommended him for promotion and noted the applicant's desire to serve as the XO or CO of a cutter. The CO stated that the applicant had moored/unmoored the ship six times, that his knowledge of ship handling was good, and that he was gaining confidence in conning. The applicant was promoted to lieutenant junior grade on November 20, 1993.

From July 1994 through July 1996, the applicant served as the XO of a 110' patrol boat. On his first OER in this position, the applicant received all marks of 4 and 5 and his CO's recommendation for promotion. The CO noted that the applicant's ship handling was improving. On his second OER in this position, the applicant received primarily marks of 5 but a low mark of 3 for "Judgment" because he was the Officer of the Deck (in charge) when the patrol boat grounded while chasing another vessel. The CO commented that the applicant's "[i]ndecision as underway OOD [was] evident during grounding ... waited for direction rather than initiate action ... needed reminding to follow underway standing orders." The CO recommended the applicant for promotion, for assignment to post-graduate school in finance, and for assignment as an operations or supply officer on a medium endurance cutter. The OER reviewer added a page of comments indicating that he would have assigned the applicant higher marks, includ-

ing a 4 for "Judgment." On his third OER as XO of the patrol boat, the applicant received primarily marks of 6, a mark in the sixth spot on the comparison scale²—which denotes an exceptional officer—and his CO's recommendations for promotion and for command of a patrol boat. The CO wrote that the applicant "possesses tremendous courage of character, has rigorously tested and proved his ship handling skills in difficult situations, ... and has demonstrated remarkable maturity and a positive leadership influence as XO." On his fourth OER as XO of the patrol boat, the applicant received primarily marks of 6, a mark in the sixth spot on the comparison scale, and his CO's recommendations for promotion and for command of a patrol boat. The CO wrote that the applicant "possesses the requisite courage, responsibility and confidence to command at sea, superior ship handling skills, ... remarkable maturity and positive leadership."

From August 1996 through January 1998, the applicant attended graduate school, as duty under instruction, to receive a master's degree in business administration (finance). He was promoted to lieutenant on November 20, 1996.

From February 1998 through May 1999, the applicant served as a contract specialist. On his OER for this work, he received primarily marks of 6, a mark of 5 on the comparison scale—which denotes an "excellent performer; give toughest, most challenging leadership assignments—and his reporting officer's recommendation for assignment to command afloat or ashore. The reviewer added a comment page, stating that the applicant's "demonstrated leadership potential, interpersonal skills and ability to solve complex problems will enable him to excel in demanding command positions."

From June 1999 through May 2001, the applicant served as a budget analyst and financial manager. On his first OER for this work, he received eight marks of 5 and ten marks of 6 in the various performance categories and a mark of 5 on the comparison scale. In addition, he received strong recommendations for promotion and for command afloat. On his second OER for this work, the applicant received four marks of 5, thirteen marks of 6, and one mark of 7 in the performance categories and a mark of 5 on the comparison scale, as well as strong recommendations for promotion and for command afloat.

On May 27, 2001, the applicant began serving as the XO of the buoy tender. He supervised 6 other officers and 41 enlisted personnel. In August 2001, he was selected for promotion to lieutenant commander. On his first OER as XO of the buoy tender, dated May 31, 2002, the applicant received thirteen marks of 5, five marks of 6, and a mark of 4 on the comparison scale, which denotes a "good performer; give tough, challenging assignments." The CO, who served as both the applicant's supervisor and reporting officer, included the following written comments in support of the marks:

² The comparison scale is not numbered, but the scale has seven possible marks. A reporting officer completes the scale by comparing the reported-on officer with all other officers of the same rank whom the reporting officer has known throughout her career.

First reporting period as WLB XO. Mastering myriad of admin, managerial, operational responsibilities & missions on a new platform. Learning single screw shiphandling techniques, applying pivot point theory, restricted water shiphandling, increasing in skill level; successfully conned ship during 21 buoy evolutions, 5 moorings & 6 ice breaking missions in increasingly difficult conditions (wind 20+ kts, -0 temps, low vis). Always acted [in accordance with] NAVRULS; scored 100% on closed book NAVRUL exam. Coached 1 ENS & 2 QM1 DWOs in trng; all are on track to qual[ify]ing on sked. Effectively delgated projects & tasks to JOs & POs; unit was ready for every mission, visit & inspection....

... Principled, firm supporter of CG core values & COMDT policies....

[The applicant] launched his XO responsibilities immediately after reporting aboard; effective performance in the demanding WLB XO role. He is extremely familiar & comfortable w/ the CG's budget making process & handling a unit's finances. He has expressed desire for Comptroller & upper level finance positions & has my highest recommendation for any of these most challenging, high visibility finance positions. He has also stated interest to command an afloat unit; is progressing well, expect to offer recommendation for command afloat during his next marking period. Was selected for O-4 in AUG 01 & is waiting for his OPAL msg to be released.

On the disputed OER, which covers the applicant's service as XO of the buoy tender from June 1, 2002, to his departure on June 27, 2003, he received the marks and supporting comments shown in the table below (with the disputed marks and comments shaded).

MARKS AND COMMENTS IN OER

#	CATEGORY	MARK	WRITTEN COMMENTS
3a	Planning and Preparedness	5	Effectively delegated myriad of admin, managerial, operational responsibilities, projects & tasks to JOs & POs; unit was ready for every mission, visit & inspection, many unit successes; reduced # of discreps during Command Assessment for Readiness & Training (CART) fm '01 by 56%; clean sweep in Tailored Annual Cutter Trng (TACT) w/ score of 97%, unit earned E ribbon; only 5 minor discreps during FSAT visit of galley, fleet average is 25, galley selected as first runner up in Galley of the Year Contest. Well prepped for appearance at CG Fest, gave thousands of tours, ship was impressive backdrop for CG Memorial Service, short notice for 2 deployments to break ice in Canadian port. Always prepped for ceremonies: re-enlistments, advancements, retirements & visits by MN Gov., D9 Commander, outreach cruise for industry & political leaders. Thorough preps for \$\$ backlog & fallout funds; unit gained much needed cold wx PPE, LE & AT/FP gear, AtoN hardware. Continued to develop cognitive perception to react, maneuver single screw ship; given the responsibility to train 4 DWOs in trng. Had deck or conn for 63 buoy evolutions, 13 moorings; moored ship in challenging 20 kt off-dock wind conditions. Gained valuable experience during 31 ice breaking missions in worst ice conditions on Great Lakes in 25 years. Flexible as u/w DWO; stood watches in 1 in 3, often had the midwatch. Relied upon for admin/budget expertise.
3b	Using Resources	5	
3c	Results/ Effectiveness	6	
3d	Adaptability	6	
3e	Professional Competence	4	
4a	Speaking and Listening	5	Confident comms while addressing crew & 1-on-1. Frequent discussions w/ D9 admin/legal resolved many complex issues. Guest speaker for Mariner's Day at church & Optimist Int'l Club; well recv'd. Interviewed by 3 local TV STAs during ice breaking ops; well delivered comments. Published writer in regional magazine ANGLER; submitted 4,000 word article about local CG units & ops w/ photos; readers delighted. Drafted 12 OERs, submitted 3 discharge pkgs, polished 7 personal awards, Galley of the Yr Contest, Enlisted Person of the Yr.
4b	Writing	6	
5a	Looking Out for Others	5	Strongly promoted crew professional development, took advantage of every possible "C" schl trng opportunity; enhanced mbrs' job performance & advancements. Made rcmd'n to ISC Family Programs to offer proactive family/parenting trng; ISC took rcmd'n FORAC, no offer parenting skills class. Led 3 Inport OOD qual boards. Mbr of Direct Commission Eng. Board; asked challenging q's of CPO candidate. During TACT, directed OBTT in prepping drill scenarios, running & grading drills; unit earned clean sweep & E ribbon. Recognized critical importance of family support; effectively used Ombudsman, kept families informed during extended deployments. Jumped on fallout fund solicitation; unit rcv'd much needed cold wx PPE & LE gear. Arranged for Merchant Marine Midshipman to come aboard during 3 day u/w period to maximize his trng experience. Extensively delegated projects & tasks to Dept. heads, JOs & POs; led to natural formation of teams, well trained mbrs, smooth functioning unit; unit ready for every mission, visit & inspection; acting XO seamlessly covered duties during SNO's leave; ran MKC's retirement ceremony, coord'd unit's smallpox vax. Cmd Chief & Dept. Heads were POCs w/ CGPC-epm, kept unit at PAL. Met own OES reqs, submitted 12 OERs; enlisted evals accurate, fair & consistent.
5b	Developing Others	6	
5c	Directing Others	5	
5d	Teamwork	6	
5e	Workplace Climate	5	
5f	Evaluations	4	
6	Signature of the CO as the applicant's Supervisor, dated July 25, 2003		
7	Reporting Officer's Comments	NA	Supervisor is Reporting Officer. [The applicant] is firmly principled & a strong supporter of CG Core Values & COMDT policies. Smart, keen, quick to learn & apply computer based technology. Loyal, strong supporter of CO's policies. Manner in which he delegated projects & work caused teams & networks to form throughout ship; unit's many successes [are] directly attr but able to having a ship full of strong, motivated performers who identified & filled the gaps in the command strata & ensured the ship would always succeed. Well prepared for XO relief week.
8a	Initiative	5	Embraced e-CG initiatives & aided ship-wide adoption thru trng sessions; brought purchase cardholders up to speed on Purchase Card Application of FINCEN Metaframe; improved timeliness & accuracy of verification, reduced late payments & fees. In absence of CG policy, developed unit policy for Employee Review routing & tracking. Led unit thru successful CART & TACT. Input at XO Conf., led to chg in PERSMAN ch. 20 requiring alcohol screeners to be health care professionals properly trained in substance abuse/dependency. Ongoing comms w/ HRSIC led to improvements in e-interview & employee review. Responsive to UCMJ infractions; maintained good order & discipline. During 5 NJP proceedings, delivered remarks supporting CG core values & regs. Navigator; after sloppy transit, led nav team discussion re nav standards. Crew's performance of military honors during RADM & MN Gov. visits was noteworthy. Interviewed by reps fm local ABC, NBC, CBS affiliated TV networks; stressed importance of CG's ice breaking role to the economy of the Great Lakes region. Neat trim appearance; model CG image. Participated in unit morale events; avid runner, ran/finished marathon.
8b	Judgment	5	
8c	Responsibility	5	
8d	Professional Presence	6	
8e	Health & Well-Being	5	
9	Comparison Scale	5	[A mark of 5 means that in comparison with other lieutenants, the CO rated the applicant as an "excellent performer, give toughest, most challenging leadership assignments."]
10	Potential	NA	Savvy, insightful in the CG's budget-making process; brilliance in this area is readily apparent to

		all. [The applicant's] strong suit is in financial mgmt & budget making; strongly recommended for 30 coded "F"-type assignments. Expertly utilized MBA deg. in finance. Expressed a strong desire for Comptroller & upper level finance positions & has my highest recommendation for any of these positions. Strong, career-motivated CG officer. Enjoys being at sea; recommended for continued sea service as XO of WHEC/WMEC. Recommended for Sr. Service School. Selected for promotion to O-4; OPAL 07-03 authorized his promotion to O-4 effective 01 JUL 03.
11	Signature of the CO as the Reporting Officer, dated July 25, 2003	
12	Signature of reviewer, dated September 15, 2003	

The CO also awarded the applicant an end-of-tour Achievement Medal, the citation for which commends his superior performance of duty as XO.

On July 1, 2003, the applicant was promoted to lieutenant commander. On June 28, 2003, the applicant began serving as chief of the Pacific Area's Training and Readiness Section and then branch chief of the Readiness Force. On his OERs for this work, he has received high marks of 5, 6, and 7 in the performance categories, marks of 5 on the comparison scale, and his reporting officers' strong recommendations for command afloat and promotion to commander.

VIEWS OF THE COAST GUARD

On September 27, 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 alleged that the applicant's "allegations of error are not supported by the record." He argued that the applicant's CO "was in the best position to observe and evaluate the Applicant's performance. The Applicant has not established facts to overcome the presumption that his commanding officer acted correctly, lawfully and in good faith in preparing his OER." The JAG adopted the facts and analysis of the case provided in a memorandum prepared by CGPC.

CGPC noted that the applicant did not submit an OER reply when he received the disputed OER, as he was permitted to do to express his own views about his performance, or apply to the Personnel Records Review Board for the requested OER corrections.

CGPC stated that the CO was responsible for evaluating the applicant's performance fairly and that he reported to her on a daily basis and received most of his assignments and direction from her. CGPC stated that "[d]ue to the exigent and often isolated environment aboard a cutter, [the CO] was consistently, if not solely, the principal officer best positioned to evaluate the Applicant's conduct and performance."

CGPC stated that the CO was better positioned than the Operations Officer, who wrote on behalf of the applicant, to judge the applicant's abilities and leadership potential to command a cutter. CGPC stated that the Board should grant greater deference to the CO's assessment of the applicant's abilities than to that of the cutter's Operations Officer.

CGPC stated, that although the applicant complained that the CO failed to warn him specifically about not recommending him for command afloat on the disputed OER, the Personnel Manual does not mandate such counseling. CGPC argued that the Personnel Manual places responsibility on the reported-on officer to seek performance feedback. CGPC noted that the CO did counsel the applicant about his ship handling in close quarters situations and about his situational awareness and navigation. CGPC argued that there "is no basis for amending the [disputed] OER or expunging it from his record." CGPC included with its memorandum declarations signed by the CO and by the review of the disputed OER.

In a declaration signed on August 14, 2006, the CO stated that she would not respond to the applicant's "*ad hominem* attacks on my intentions and alleged conduct [so as not to] detract the focus from [the applicant's] performance." Regarding the mark of 4 she assigned the applicant for his "Professional Competence," the CO stated that while the applicant was knowledgeable of Coast Guard operations and ship handling methodology,

in applying his seamanship and navigation skills to maneuver the cutter, he did not consistently anticipate, plan for, and avoid situations that placed the cutter in close quarters situations. In repeated training and counseling sessions, I conveyed to [him] and the other OODs the manner in which I expected the ship to be conned and the bridge watch to be conducted while servicing aids to navigation, breaking ice, and during open water steaming. Regardless of the number of aids that [the applicant] had the conn or deck, at the end of his tour he was still placing the cutter between the shoals and the aids that marked the shoals while the Bridge Positioning Team informed him that he was "within the danger range." Although a competent ship handler, he was too reactive, and had still not developed the more "global" sense of awareness and defensive ship handling skills that make an exceptional operator.

The CO also stated that the applicant was also frequently unavailable to handle emergencies after hours when he should have been reachable by telephone. She stated that she was required to handle situations because the applicant's home telephone would be turned off and he would not return messages. The CO stated that even after she counseled the applicant about keeping his telephone turned on, she continued to receive calls because he was unreachable. The CO stated that an "XO who makes himself inaccessible to the officers and crew is unable to discharge the full scope of his duties."

Regarding the mark of 4 for "Evaluations," the CO stated that the applicant sometimes missed the deadline for submitting his subordinates' evaluations to her, so she had to rush to make her own deadline. The CO alleged that upon his departure from the buoy tender, the applicant failed to leave notes for five subordinate officers' evaluations that were that coming due as he had agreed to do since the new XO would have observed their work for only five weeks before having to complete their OERs.

The CO stated that she could not recommend the applicant for command afloat because he

did not demonstrate the professional competence and judgment expected of leadership positions that operate with little or no experience. ... He simply did not demonstrate that he could handle all of the facets of the position by assimilating and processing all relevant facts and coming to a sound and authoritative decision, often under time constraints. While he was a competent Executive Officer in the majority of endeavors, he had not demonstrated the potential to move beyond the requirements of the position he occupied. ... Although capable of good things, he did not take the next step to show commanding officer potential. I didn't see it happen.

The CO further stated that soon after the applicant reported aboard, she "explained to him that before he saw the command endorsement in an OER, he would have a letter in his hand ... that stated that [she] considered him qualified to assume command of [the buoy tender] in all vessel statuses during [her] absence and that [the District office] would get a copy of the letter. [She] never did give [the applicant] an unrestricted letter, for the reasons detailed above."

The CO concluded that the comments in the disputed OER "are factually accurate and reflective of [the applicant's] performance." She stated that she carefully crafted the OER to ensure that he would be competitive for promotion and "to limit the impact of [her] reservations to [his] potential for *command afloat*, which necessarily involves consideration of qualifications that are quite unique in the seagoing military service."

The reviewer of the disputed OER stated only that he found no errors, omissions, or inconsistencies when he reviewed it.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 10, 2006, the applicant responded to the views of the Coast Guard. He alleged that the affidavit of the Operations Officer clearly refutes the CO's comments about his ship handling and professional competence. He alleged that "[n]ot once [during the evaluation period] did [the CO] indicate that I was performing at a level that would preclude her from recommending me for command afloat." He alleged that her only comment about that recommendation prior to the disputed OER was her comment in the prior OER about expecting to recommend him for command afloat.

Regarding the CO's statement about the letter, the applicant stated that soon after their discussion of the letter, there was a mishap in the region, and the CO told him that the District had instituted a new policy that prohibited XO's from taking ships out as acting CO's. Therefore, he thought that he would not be receiving an unrestricted letter to assume command no matter how superlative his performance. He thought such letters were no longer allowed and so he did not expect any. The applicant noted

that the next junior command afloat screening panel would convene on November 14, 2006.³

APPLICABLE REGULATIONS

Duties of an Executive Officer

Chapter 4-1-5.A. of Coast Guard Regulations (M5000.3B) states that “[t]he commanding officer shall normally issue all orders relative to the duties of the command and the administration of personnel through the executive officer, and shall keep the latter informed of all policies.” Chapter 4-2-15.A. provides that the CO “shall as often as possible entrust the handling of the vessel during important evolutions to the executive officer” Chapter 6-2-1.A. of the Regulations states that “[t]he executive officer shall be primarily responsible for the organization, coordination of effort, performance of duty, and good order and discipline of the entire command. While recognizing the right and duty of heads of departments and other officers to confer directly with the commanding officer on important matters relating to their duties, the executive officer must be responsible for keeping appropriately informed of such matters.” Chapter 6-2-3.A. of the Regulations provides that the specific duties of the XO include supervising the administration of the business of the ship; performing the functions of the personnel officer of the unit; preparing and maintaining bills and orders for the organization; supervising and coordinating work, exercises, and training; supervising and coordinating the procurement of supplies; preparing and promulgating work schedules; inspecting departments; functioning as safety officer; and endeavoring to maintain high morale.

Rating Chain Responsibilities

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

Article 10.A.1.b.2. states that “[i]ndividual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards.” Article 10.A.2.c.2.c. states that a responsibility of a reported-on officer is to, “[a]s necessary, seek[] performance feedback from the Supervisor during the period.” Article 10.A.2.c.2.k. states that a reported-on officer “[a]ssumes ultimate responsibility for managing own performance, notwithstanding the responsibilities assigned to others

³ ALCGPERSCOM 096/06 indicates that the applicant was not selected for command afloat by this panel.

in the rating chain. This includes ensuring performance feedback is thorough, and that OERs and associated documentation are timely and accurate.”

Article 10.A.2.d.2. states that a Supervisor

- a. Evaluates the performance of the Reported-on Officer in the execution of duties.
- b. Provides direction and guidance to the Reported-on Officer regarding specific duties and responsibilities.
- c. Discusses at the beginning of the period, upon request, or when deemed necessary, the Reported-on Officer’s duties and areas of emphasis. ...
- e. Provides performance feedback to the Reported-on Officer upon that officer’s request during the period or at such other times as the Supervisor deems appropriate.
- f. Counsels the Reported-on Officer at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discusses duties and responsibilities for the subsequent reporting period and makes suggestions for improvement and development. ...
- j. Provides the new Supervisor with a draft of OER sections (3-6) when the Supervisor changes during a reporting period. The draft may be handwritten and shall include marks and comments (bullet statements are acceptable) for the period of observation. It shall be prepared and signed by the departing Supervisor prior to departing.

Instructions for Preparing an OER

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

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

• • •

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

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. Comments must be sufficiently specific to paint a succinct picture of the officer's performance and qualities which compares reasonably with the picture defined by the standards marked on the performance dimensions in the evaluation area. Mere repetition or paraphrasing of the standards is not sufficient narrative justification for below or above standard marks.

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

Article 10.A.4.c.9. states that in block 10 of an OER,

a. The Reporting Officer shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard. These comments shall be limited to performance or conduct demonstrated during the reporting period.

b. Comments in this section reflect the judgment of the Reporting Officer and may include, but are not limited to, the following:

- Qualification to assume the duties of the next grade.

- Specialties or types of assignment, such as command, for which the Reported-on Officer is qualified or shows aptitude.

- Recommendations for selection to a senior service school.

- Special talents or skills (or lack of) such as military readiness and warfare skills, seamanship or airmanship, etc., as applicable.

c. Comments shall be confined to the allotted space on the form.

Replies to OERs

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

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction over this matter pursuant to 10 U.S.C. § 1552. The application was timely.

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

3. The applicant did not submit a reply to the OER within fourteen days of receiving it, as allowed under Article 10.A.4.g. of the Personnel Manual, and did not apply to the Personnel Records Review Board for correction of the disputed OER within one year of receiving it, as allowed under Article 14.B.3. However, under 10 U.S.C. § 1552, Congress established a three-year statute of limitations for this Board,⁴ and a member's failure to exercise expired administrative remedies does not waive the member's right to seek a record correction via this Board.

4. Absent specific evidence to the contrary, the Board presumes that an applicant's rating officials acted correctly, lawfully, and in good faith in making their evaluations.⁵ Once an applicant has rebutted the presumption of regularity by presenting at least some evidence that “specifically and convincingly contradicts his rating officials' marks and comments,”⁶ the Board weighs the evidence in the record to determine

⁴ Moreover, under *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994), 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.”

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

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

whether the applicant has met his burden of proof—the preponderance of the evidence—with respect to the challenged OER.⁷ The Board determines whether the applicant has proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁸

5. The applicant asked the Board to improve his CO’s assessment of his ship handling in the disputed OER by replacing the comment “Continued to develop cognitive perception to react, maneuver single screw ship” in block 3 with the comment “Confident, highly skilled ship handling and seamanship in demanding conditions.” The applicant alleged that (a) the fact that he was assigned to train subordinates to become deck watch officers; (b) the fact that the CO trusted him to drive the ship on numerous occasions under difficult conditions; and (c) the Operations Officer’s statements about his ship handling ability prove that the contested comment is unjust and should be replaced with high praise of his ship handling and seamanship. The Operations Officer called the applicant’s ship handling “adept” and noted that he was the “‘go-to’ ship driver during particularly complex maneuvering evolutions.”

6. Chapter 4-2-15.A. provides that the CO “shall as often as possible entrust the handling of the vessel during important evolutions to the executive officer” The record shows that the CO complied with this regulation even though she was not overly impressed with the applicant’s handling of the buoy tender. Her compliance does not persuade the Board that the applicant’s ship handling merited the high praise he requests. Nor does the fact that the CO assigned the applicant to train other deck watch officers persuade the Board that she did so because she was impressed with his ship handling ability. In her declaration for CGPC, the CO elaborated on the disputed comment by explaining that the applicant “did not consistently anticipate, plan for, and avoid situations that placed the cutter in close quarters situations” and that even “at the end of his tour he was still placing the cutter between the shoals and the aids that marked the shoals while the Bridge Positioning Team informed him that he was ‘within the danger range.’ Although a competent ship handler, he was too reactive, and had still not developed the more ‘global’ sense of awareness and defensive ship handling skills that make an exceptional operator.” The Operations Officer’s statements do not sufficiently rebut the CO’s comments. The Board finds that the applicant has not proved by a preponderance of the evidence that the comment “Continued to develop cognitive perception to react, maneuver single screw ship” in block 3 of the disputed OER is erroneous or unfair or should be replaced with the laudatory comment proposed by the applicant.

7. The applicant asked the Board to raise his mark for “Professional Competence” from a 4 to a 6. He alleged that the end-of-tour Achievement Award he received

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

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

from the CO and the high ratings, awards, and commendations received by the buoy tender during the evaluation period prove that his "Professional Competence" met the criteria for a mark of 6. The Board notes that the criteria for a mark of 4 in this category on an OER form are that the reported-on officer was a "competent and credible authority on specialty or operational issues. Acquired and applied excellent operational or specialty expertise for assigned duties. Showed professional growth through education, training and professional reading. Shared knowledge and information with others clearly and simply. Understood own organizational role and customer needs." The criteria for a mark of 6 in this category are "superior expertise; advice and actions showed great breadth and depth of knowledge. Remarkable grasp of complex issues, concepts, and situations. Rapidly developed professional growth beyond expectations. Vigorously conveyed knowledge, directly resulting in increased workplace productivity. Insightful knowledge of own role, customer needs, and value of work." The record shows that both the applicant and the buoy tender enjoyed significant successes during the evaluation period and that the Operations Officer found he had "astute leadership qualities." Nevertheless, the Board cannot say that the applicant's performance clearly exceeded the criteria for the mark of 4 as the record also shows that the CO had significant reservations about specific, important aspects of the applicant's professional competence: his situational awareness and ship handling, his willingness or ability to stay accessible for emergencies, and assimilation of facts and authoritative decision making under time constraints. The Board finds that the applicant has not proved by a preponderance of the evidence that the mark of 4 he received for "Professional Competence" in the disputed OER is erroneous or unjust.

8. The applicant asked that the mark of 4 he received for "Evaluations" be raised to a 5 or 6 because he often helped the CO draft her parts of their subordinates' evaluations. The criteria for a mark of 4 in this category are "Reports consistently submitted on time. Narratives were fair, concise, and contained specific observations of action and impact. Assigned marks against standards. Few reports, if any, returned for revision. Met own OER responsibilities as Reported-On Officer." The criteria for a mark of 6 are "No reports submitted late. Narratives were insightful, of the highest quality, and always supported assigned marks. Subordinates' material reflected same high standards. No reports returned for revision. Returned reports to subordinates when appropriate." The CO stated in her declaration that the applicant sometimes missed his deadlines for forwarding subordinates' OERs and that he failed to submit draft OERs for officers he supervised upon his departure from the ship. A supervisor's failure to submit draft OERs violates Article 10.A.2.d.2.j. of the Personnel Manual and can negatively affect subordinates' careers. The applicant has failed to rebut the CO's statements. The Board finds that the applicant has not proved by a preponderance of the evidence that the mark of 4 for "Evaluations" in the disputed OER is erroneous or unfair.

9. The applicant asked the Board to replace the comment "Enjoys being at sea; recommended for continued sea service as XO of WHEC/WMEC" in block 10 of the disputed OER with the comment "Has earned my highest recommendation for

immediate command afloat of a WLB, WTGB w/ barge or WPC.” He alleged that the CO’s failure to recommend him for command afloat was both erroneous because he was well qualified for command afloat and unfair because she knew he wanted such a recommendation yet failed to forewarn him that he was not gaining her recommendation for command afloat. Article 10.A.4.c.9. of the Personnel Manual does not require a reporting officer to make any specific recommendation or non-recommendation about an officer’s potential for command afloat or even for promotion. The Operations Officer stated only that “[b]ased upon my observations, there is nothing lacking in [the applicant’s] knowledge, ship handling, and leadership abilities that would preclude him from serving in a command afloat assignment. Rather, based upon my limited experience, what I’ve witnessed of [his] abilities would serve as qualifications toward a command afloat assignment.” Neither this statement nor anything else in the record convinces the Board that the applicant’s performance entitled him to his CO’s recommendation for command afloat in the disputed OER rather than to the recommendations she willingly made.

10. The applicant’s CO wrote in the first OER she prepared for him that she expected to be able to recommend him for command afloat in his next OER. Instead, in the next, disputed OER, she recommended him highly for non-sea service or for sea service as an XO of a high or medium endurance cutter. The applicant alleges that the omission of the recommendation for command afloat was unfair because she never specifically advised him during the evaluation period that he had not yet gained her recommendation. However, the CO stated that she did counsel him about important aspects of his performance, including his ship handling and accessibility after hours. The Board finds that the applicant has not proved that the CO failed to provide proper feedback on appropriate occasions as required by Article 10.A.2.d.2.e. of the Personnel Manual. The applicant clearly knew at the beginning of the evaluation period that he did not yet have his CO’s recommendation for command afloat, which was apparently extremely important to him. He failed to ask her for an entire year thereafter whether he was gaining or had gained her recommendation for command afloat. Even though she had told him she would give him a letter when he received her recommendation and she never did so, he apparently assumed that he had nevertheless gained her recommendation because of a change in the District’s policy about XOs acting as COs. Given such circumstances, the Board cannot find that the CO’s failure specifically to advise the applicant that he had not gained her recommendation for command afloat during the evaluation period renders her subsequent comments in block 10 of the disputed OER erroneous or unjust.

11. The applicant made numerous allegations with respect to the actions and attitude of his CO. Those allegations not specifically addressed above are considered to be unproved and/or not dispositive of the case.

12. The applicant has not proved by a preponderance of the evidence that the disputed OER was adversely affected by a “misstatement of significant hard fact,”

factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.⁹

13. Accordingly, the applicant’s request should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

⁹ *Hary v. United States*, 618 F.2d 704, 708 (Cl. Ct. 1980); CGBCMR Docket No. 86-96.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG, for correction of his military record is denied.

Jordan S. Fried

George J. Jordan

Charles P. Kielkopf