

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-027

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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 November 13, 2006, upon receipt of the applicant's completed application.

This final decision, dated June 13, 2007, is approved and 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, a lieutenant (LT) on active duty, asked the Board to correct his record by removing his officer evaluation report (OER) for the period June 1, 2005, to May 31, 2006, when he was serving as a marine safety inspector in xxxxxxxxxxxx. He asked that it be replaced with an OER prepared for continuity purposes only. The applicant also asked the Board to remove his failure of selection for promotion to lieutenant commander (LCDR) by the LCDR selection board that met in August 2006 and to backdate his promotion to the date he would have had if selected for promotion by that board.

The applicant alleged that the disputed OER contains inaccurate dates and comments and that some of the comments reflect higher numerical performance marks than those he was assigned. He stated that in April 2006, near the end of the evaluation period, an Assignment Officer told him that he would be transferred to New Orleans during the coming summer. Therefore, the applicant told his supervisor, Mr. X, that he would initiate an OER in expectation of his transfer to New Orleans in July 2006. He chose July 14, 2006, as the end date for the OER since that would be his final day on duty in Xxxxx. Although the usual end date for a lieutenant's OER is May 31, a July 14, 2006, end date was permissible under the rules and would allow all of his performance prior to his departure from Xxxxx to be evaluated in the OER.

On April 13, 2006, the applicant stated, the Coast Guard announced via ALCGPERS-COM 025/06 that the zone for consideration for selection for promotion to LCDR in 2006 would

include those lieutenants with signal numbers less than or equal to 2970. Since the applicant's signal number was 2976, he did not expect to be "in the zone" for selection for promotion. On June 8, 2006, however, the Coast Guard announced via ALCGPERSCOM 035/06 an increase in the zone size down to and including his own signal number. The applicant stated that he saw the announcement on June 12, 2006, and promptly spoke with his supervisor, Mr. X, and his reporting officer, CDR Y, since Mr. X was to be on leave from June 13 to July 3, 2006. He told them that he would have his OER input drafted and on Mr. X's desk by the time Mr. X returned from leave on July 3. He told them that ALCGPERSCOM 035/06 required the OER to be submitted by July 15, 2006, since the usual end of the evaluation period was May 31.

The applicant alleged that he placed his OER input in Mr. X's inbox on June 27, 2006, before he returned from leave. Mr. X completed and signed his part of the OER on July 16, 2006, and CDR Y completed and signed his part on July 27, 2006. The reviewer signed the OER on July 28, 2006, and the Coast Guard Personnel Command (CGPC) received it on July 31, 2006. The applicant stated that since the deadline for completion of his OER had been July 15, 2006, CGPC had in the interim sent queries concerning the non-receipt of his OER.

The applicant complained that in the final OER, the date of submission of his input in section 1.i. was incorrectly changed from June 27, 2006, to July 5, 2006. Moreover, on August 10, 2006, LT W from CGPC informed him that he had changed the end date in section 1.i. of the applicant's OER from July 14 to May 31, 2006, and the reason for the OER in section 1.j. from "detachment of officer" to "annual/semiannual."

The applicant stated that in the final OER, he unjustly received a low mark of 3 for "Evaluations" with the erroneous supporting comment, "Own OER submitted late without detailed input or supporting documentation." The applicant argued that this mark and comment were unfair because Mr. X had agreed with him that the end date should be July 14, 2006, and had asked him "to provide a finished OER product to him" rather than more detailed, supporting documents. In addition, Mr. X had agreed that the applicant's input should be submitted by the time Mr. X returned from leave on July 3 since he was going on leave the next day, June 13.

The applicant also alleged that no one counseled him either formally or informally during the evaluation period about any perceived change in his performance, even though the marks in the disputed OER declined dramatically from those in his prior evaluation, which was signed by the same reporting officer. The applicant pointed out that his marks in six performance categories dropped from 6 to 4 (on a scale of 1 to 7, with 7 being best); his marks in three categories dropped from 6 to 5; his marks in four categories dropped from 5 to 4; and his mark in one category, "Evaluation," dropped from 5 to 3. In total, sixteen of the eighteen numerical marks decreased, and his mark on the comparison scale dropped from the fifth spot, which denotes an "excellent performer," to the fourth spot, which denotes a "good performer"—all without any counseling about his performance from Mr. X or CDR Y. The applicant alleged that because his rating chain never counseled him about a perceived decline in performance, he believed that his performance was in line with what was expected of a senior lieutenant. The applicant stated that he is unsure whether his supervisor, Mr. X, had the required training and certification in the Officer Evaluation System (OES) before completing the disputed OER.

The applicant further alleged that the following are clear errors in the disputed OER:

- In section 2, one of his collateral duties is described as “Duty Investigator/Inspector, Port Emergency Assessment Team (PEAT) Member,” whereas in fact it should have read “Senior Duty Investigator/Inspector, Port Emergency Assessment Team (PEAT) Leader,” as indicated in section 7.
- In section 3, he is described as a PEAT member, whereas he was a PEAT leader and, in fact, trained other teams, as indicated in section 7.
- In section 8, he received an average mark of 4 for the category “Health and Well-Being,” and yet a written comment in that section stated, “Maintained exceptional military appearance, prompted peers to follow command expectations. Remained physically fit & trim through regular exercise.” He alleged that the comments support a mark of 6 in “Health and Well-Being.”
- In section 9, on the comparison scale, he is described as a “good performer,” whereas comments throughout the OER clearly support a mark of “excellent performer.” The applicant pointed to comments regarding his excellent skills and confidence.

In support of his allegations, the applicant submitted copies of the disputed OER, including a Letter of Commendation for his efforts at the time of Hurricane Katrina; the ALCGPERS-COMs announcing and changing the zone size; his OER Routing Slip dated June 27, 2006, which shows the period of the “annual” report as June 1, 2005, through May 31, 2006; an email from the applicant to Mr. X dated June 27, 2006, in which the applicant wrote “Hard copy [of OER] in your box. ... It must be received by CGPC-OPM by July 14, 2006. Thank you for rapidly completing it”; his previous OER with significantly higher marks; a chart of all of his OER marks; and a letter from his prior supervisor, a senior investigating officer at Xxxxxx, who wrote the following:

I have known [the applicant] since January 2000. [He] was a qualified duty investigator from December 2000 to June 2006 and a member of the Investigation Division from June 2004 to July 2005. ... I found [the applicant’s leadership and performance] extremely proficient and professional, and I would encourage other junior officers to emulate them. [He] is without a doubt one of the most knowledgeable and well rounded Coast Guard officers that I have supervised. [He] exceeded my expectations as an investigator and supervisor. He has mentored others and performed extremely well under a vast array of situations. Several major marine casualties and personnel action cases against merchant mariners were executed professionally and thoroughly without any significant direction from me or other senior officers.

On or about July 2005, [the applicant] volunteered to transfer to the Inspections Division to assist that division during a severe senior personnel shortage to finish his tour of duty at Sector Xxxxxx, Xxxxxx. His experience and leadership was welcomed during the shortage. Throughout the last year and up to his permanent change of station to ... New Orleans, LA, I never received any complaints, constructive criticisms or feedback from my peers or senior officers indicating that [the applicant’s] performance was on a decline. I would classify [his] performance while assigned to me at Sector Xxxxxx, xxxxx as exemplary.

VIEWS OF THE COAST GUARD

On March 26, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case.

The JAG admitted that Mr. X did not have the required certification in his record when he prepared the disputed OER, but argued that the error is harmless because Mr. X is a retired Coast Guard officer who during his 30 years of active duty “attended formal training sessions pertaining to officer, enlisted and civilian evaluation systems.” The JAG noted that in BCMR Docket No. 2006-065, the Board concluded that the assignment of a civilian without OES training as a supervisor was harmless error because the supervisor received the requisite OES training during the evaluation period and before he prepared the disputed OER.

The JAG adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the applicant did not submit his OER input to his rating chain within 21 days of the end of the evaluation period as required by Article 10.A.2.c.2.f. of the Personnel Manual. CGPC stated that affidavits by the applicant’s supervisor and reporting officer (see below) show that the applicant did not have an agreement with them to delay the end date of his evaluation period to July 14, 2006, and so his OER input should have been submitted at least 21 days before May 31, 2006. CGPC argued that the mark of 3 for “Evaluations” in the disputed OER was also warranted by the poor quality of the applicant’s OER input, as indicated in the affidavits.

CGPC alleged that the end date of the applicant’s OER was properly corrected by CGPC from July 14 to May 31, 2006, because under Article 10.A.3.a. of the Personnel Manual, lieutenants who are in or above the zone for selection for promotion to LCDR may not extend their evaluation periods beyond the usual May 31 end date. Therefore, the “administrative correction was made at the Personnel Command in order to make the report a valid evaluation.”

Regarding performance counseling, CGPC alleged that the Personnel Manual lays the responsibility for such counseling on the reported-on officer, not on the rating chain. CGPC stated that the affidavits show that the applicant did not receive formal counseling because he was meeting the expected standard of performance for commissioned officers in all categories until the very end of the evaluation period when he “fail[ed] to meet his own OER responsibilities prior to his transfer.” CGPC stated that the applicant did not receive counseling about the OER because he was transferred before his rating chain completed it.

With respect to the applicant’s complaint about the description of his collateral duty in section 2, CGPC argued that the applicant had submitted no evidence to support his allegation and that no such designation existed.

With respect to the applicant’s mark of 4 for “Health and Well-Being,” CGPC alleged that the comment about the applicant’s “exceptional military appearance” supported the applicant’s mark of 5 for “Professional Presence.” CGPC stated that the disputed mark of 4 was supported by the comment, “Remained physically fit & trim through regular exercise,” which is expected of commissioned officers.

Regarding the mark in the fourth spot on the comparison scale, denoting a “good performer,” CGPC pointed out that the same reporting officer had previously assigned the applicant a mark in the fifth spot, denoting an excellent performer,” and that there is no evidence that the reporting officer’s judgment was incorrect. CGPC stated that the comparison scale mark does not necessarily reflect any trend but reflects the reporting officer’s judgment of how the reported-on officer’s performance compares to the performance of all other officers of the same rank whom the reporting officer has known throughout his career.

CGPC alleged that the fact that the marks in the disputed OER are lower than those he received in his prior OER is irrelevant because an OER is intended to reflect only the officer’s performance during the evaluation period and is “not an indicator of trends in relation to other OERs during the career of the officer.” CGPC concluded that the applicant’s rating chain properly carried out its responsibilities and that the supervisor and reporting officer “were in the best position to observe [his] performance and proved a fair, accurate, and objective OER.” CGPC argued that the applicant failed to prove that there were any incorrect dates or comments or inconsistent comments in the disputed OER. Therefore, CGPC argued, there are no grounds for removing the OER or his failure of selection for promotion from the applicant’s record.

Statement of Supervisor, Mr. X

Mr. X stated that he is the chief of the Inspection Division in Xxxxx. He alleged that the disputed OER is “an accurate, fair, and objective evaluation ... for this reporting period with strict and conscientious adherence to the specific wording of the standards set forth in the OER.”

Regarding the end date of the OER, Mr. X stated that he did not “agree[] to allow [the applicant] to submit his OER upon detachment from Sector Xxxxx on or about July 14, 2006. Although I do not remember the specific dates, [the applicant] did discuss his options with me. I dispute that we agreed to a departure date when we spoke in April 2006, but I did agree to defer the OER submission, if permitted by Chapter 10 of the PERSMAN and provided that my supervisor, [CDR Y], agree[d]. To the best of my knowledge, no agreements or timeline was ever established during our conversation.”

Regarding the applicant’s allegations about their conversation on June 12, 2006, Mr. X alleged that his “last day in the office was Friday, June 9, 2006, just prior to departing on an extended vacation in Europe until July 5, 2006. I have no knowledge of any conversations or emails pertaining to the subject prior to my departure. No agreements or arrangements were conveyed to [the applicant] concerning this matter.” Mr. X stated that because the end date of the OER was May 31, 2006, the applicant should have submitted his input no later than May 10, 2006, not June 27, 2006. He stated that he “received [the applicant’s] poorly written OER on an outdated ... form without supporting documentation on July 5, 2006, my first day back from vacation. The result of [his] submitting his OER late was the entire rating chain having 10 days to complete the OER as opposed to the 45 days normally allowed.”

Mr. X strongly objected to the applicant’s claim to having submitted his OER input on June 27, 2006, since Mr. X did not return from vacation or receive the OER input or the applicant’s email until July 5, 2006. Moreover, because the applicant used the wrong OER form, his input had to be rewritten on the correct form. Furthermore, because the applicant did not super-

vises any subordinates during the evaluation period, his mark for "Evaluations" was based purely on how he fulfilled his own OER responsibilities. Mr. X stated that the mark of 3 was accurate in this regard. Mr. X argued that the applicant "should not have delayed his regular annual OER past the scheduled due date [May 31, 2006] once he realized that he was in the zone for promotion.

Regarding the mark on the comparison scale in the disputed OER, Mr. X stated that the applicant's prior comparison scale mark is immaterial because he was "doing a different job for a different supervisor" during the evaluation period. Mr. X stated that he evaluated the applicant on his performance during the evaluation period and assigned accurate and objective marks.

Regarding counseling, Mr. X agreed that the applicant never requested performance feedback. Mr. X admitted that he "never spoke to [the applicant] about his declining performance because my observations during the rating period and the marks assigned for this evaluation period indicated that he met or exceeded the minimum CG standard performance criteria with the exception of the Evaluation performance dimension." Mr. X stated that because the applicant's performance met or exceeded the high level expected of all Coast Guard officers, "no performance feedback was conducted or warranted." Mr. X stated that he did not provide counseling after the OER was completed and before it was submitted to CGPC because of the hurried timing and deadline for the OER. After the OER was submitted, he did provide counseling to the applicant about how to improve his mark for "Evaluations."

Regarding the description of the applicant's duties in section 2 of the OER, Mr. X stated that in his 20-plus years in the marine safety field, he has "never heard of or designated anyone as a 'senior' duty investigator/inspector." He further stated that the applicant was a PEAT member during the evaluation period and that "no further or amplifying designation is required or warranted." Mr. X stated that the reporting officer's description of the applicant's performance as a "PEAT leader" in section 7 of the OER reflected a "one time event" during the evaluation period, and that the applicant's actual collateral duty was accurately described as being a PEAT member.

Regarding the mark of 4 for "Health and Well-Being," Mr. X stated that it is accurate because the applicant's military bearing was accounted for in the mark of 5 for "Professional Presence." Mr. X stated that to exceed a mark of 4 for "Health and Well-Being," an officer "must be contributing beyond the standard and impacting others through their actions."

Regarding his own training in the OES, Mr. X stated that as a retired lieutenant commander in the Coast Guard, he has "attended formal training sessions pertaining to officer, enlisted and civilian evaluation systems throughout my 30-year career." Mr. X concluded that the disputed OER is "an accurate assessment of [the applicant's] performance."

Statement of Reporting Officer, CDR Y

CDR Y, who is the Chief of the Prevention Department at Xxxxx stated that the applicant

knew he needed to provide OER input to his supervisor 21 days prior to the end of his marking period. He made the decision to hold off on submitting his input until well after the required time frame despite the fact that he would be just six signal numbers away from being within the zone for promotion consideration. [He] decided to submit his input to his supervisor, who was not at work

and would not return until 5 July 2006, on 27 June 2006, 15 days after he learned that he would be within the zone for promotion consideration. [His] actions gave the rating chain 10 days to complete the OER. ... [His] OER made it into his record in time for the selection board, therefore the amount of time it took for the OER to be completed has no bearing on his assertion that he was served an injustice.

[Regarding the mark of 3 for Evaluations, the] sum total of information turned into the rating chain consisted of a very poorly written OER, submitted on an outdated form and nothing else. It appeared to me that [the applicant] did not really care about what he turned in, just that he turned it in. ... At no time during the marking period did [he] ever seek input or counseling on the performance of his duties from me. [He] did not meet his own OER responsibilities as the Reported-on-Officer per Article 10.A.2.c.2.k. of the Coast Guard Personnel Manual. He didn't ensure that he provided an accurate list of accomplishments for the marking period; he did not seek counseling; and he failed to manage his own performance.

[The applicant] ... was marked objectively against the standards of the performance dimensions on the OER. His comparison of previous marks against his most recent OER is immaterial in that he was performing a different job for a different supervisor and performing at a different level of performance throughout the marking period. [He] received numerical marks and an OER that was indicative of his performance during the period observed.

During the two years I have been at this unit, [the applicant] has consistently told everyone he came into contact with that he was going to retire from the Coast Guard upon the completion of his tour at Sector Xxxxx. He submitted a retirement letter to CGPC-opm in 2005 with a retirement date of 2007 which was ultimately not acted upon by CGPC-opm. His attitude for the time that I have known him is one of "I'm retiring, so you can't bother me." This attitude in my view carried over into his performance, which, while not to the point of being poor, was not to the standards of a 6. It wasn't until he saw his name as being in the zone for being considered for O-4 did his attitude change, albeit very little, and he took some interest in continuing his career in the Coast Guard. [The applicant] did enough to reach the expected standard, a 4, in each performance dimension and in the cases where he did more he was marked accordingly.

I strongly disagree with [the applicant's] assertion that block 9, the comparison scale, should be marked as an excellent performer. The instructions for block 9 state, "Compare this officer with other of the same grade whom you have known in your career." For the year that [the applicant] was working as a Marine Inspector he was not in my opinion, which is what block 9 is, my opinion, an excellent performer. [He] did just enough to get by and no more, consistent with his outlook that he was retiring and didn't need to do any more than was necessary.

... I believe that [the supervisor, Mr. X] has a better grasp of the OES than [the applicant] given [Mr. X's] 23 years of active duty service, as well as his time spent as a civilian at this unit. [Mr. X's] job title is "Supervisory Inspector" and he is also the Chief of the Inspection Division. ...

[The applicant] was not served an injustice with his 2005-2006 OER. What he received was an accurate assessment of his performance for the period. The typical high performing officer in the Coast Guard is defined by the OER form as one that receives 4's in all performance dimensions. [He] met or exceeded those requirements and in my view didn't need to be counseled on the fact that he was meeting the expectations.

Statement of the OER Reviewer, CAPT B

CAPT B repeated CDR Y's allegations about the applicant delaying his input for his OER. CAPT B stated that he reviewed the OER for accuracy and "found nothing out of sorts in regard to the marks given and the comments that supported them." CAPT B stated that his deputy, CAPT S, also reviewed the OER and "found nothing inconsistent or otherwise noteworthy."

CAPT B stated that he asked CDR Y about the mark of 3 for Evaluations and was told that the applicant “submitted only a poorly written and completely unsupported OER on the incorrect form as his total input. Virtually every other OER that comes to me for review includes at least several pages of supporting documentation. Given the paucity of information that [Mr. X and CDR Y] had to work with, it is surprising that [the applicant] received as good an OER as he did. I fully trust [Mr. X and CDR Y] to provide unbiased, accurate assessments of the Officer under them and have had no reason to question their abilities to do so for the past year and nine months that I have been the Sector Commander.”

CAPT B further stated that the applicant’s chart of his OER marks and the statement by his prior supervisor, the senior investigating officer, “serve very effectively to highlight the marked drop in performance by [the applicant] during the period in question from ‘excellent’ to ‘good.’ A previous record of sustained excellent performance has no bearing on the period of performance being evaluated.” He alleged that the disputed OER is an accurate assessment of the applicant’s performance.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 27, 2007, the Chair sent the applicant a copy of the views of the Coast Guard and invited him to respond within thirty days. The applicant was granted an extension and responded on May 9, 2007.

The applicant repeated some of the arguments in his application. He also argued that Mr. X’s lack of OES training and certification as a civilian employee cannot be considered harmless error because (a) he has not been a uniformed officer since July 31, 1998, and had a six-month break in service before being hired as a civilian on February 1, 1999; (b) Mr. X has not proved that he actually received OES training during his uniformed career; (c) Mr. X has been a civilian employee for seven years and the OES procedures and performance dimensions have been amended during that period; and (d) Mr. X did not serve on a rating chain for his first six years as a civilian employee so he had not evaluated an officer under the OES for many years. The applicant pointed out that the Personnel Manual provides no waiver of the requirement that civilian employees have OES training and certification for retired officers reemployed as civilians. The applicant also alleged that the fact that CGPC had to correct a date on the disputed OER shows that Mr. X’s lack of OES training and certification as a civilian was harmful.

The applicant submitted a copy of Mr. X’s official Position Description dated February 1, 1999, which indicates that although Mr. X was hired as a “Supervisory Marine Inspector,” he was not assigned to be a supervisor at that time. The applicant complained that when Mr. X was appointed Chief of the Inspection Division in March 2005, the Coast Guard never updated Mr. X’s official position description to include that role.

The applicant argued that the final decision in BCMR Docket No. 2006-065 is not germane to his case, because in that case the supervisor received very timely OES training during the evaluation period for the disputed OER. The applicant argued that his case is similar to that of the applicant in BCMR Docket No. 2002-101, whose OER was removed by the BCMR because his civilian supervisor was not properly trained in the OES and so was deemed unqualified to serve on a rating chain.

The applicant stated that his attitude was not “you can’t bother me” during the evaluation period, as described in CDR Y’s affidavit, and that if that was the rating chain’s perception of his attitude, they should have counseled him about. However, contrary to regulation, he received no performance feedback during the evaluation period or at the end of the period. He alleged that after his last day, but before he left the area, he asked Mr. X “if he needed anything else for my OER. He stated, “No, I got everything I need” and did not provide any performance counseling until the applicant received the OER and contacted him. The applicant again criticized his rating chain for not providing timely end-of-period counseling and for not submitting the OER to CGPC until July 31, 2006, even though it was due on July 15, 2006.

Regarding the timing of his OER input, the applicant stated that his belief that he would not be in the zone for selection for promotion was reasonable based on the announcement in ALCGPERSCOM 025/06.

Regarding Mr. X’s affidavit, the applicant submitted a “PCS Departing/Separation Worksheet,” signed by Mr. X on May 4, 2006, which shows the applicant’s departure date as July 14, 2006. The applicant argued that the form proves that, contrary to Mr. X’s claim, Mr. X agreed that the applicant’s departure date would be July 14, 2006. In support of his allegation that he discussed the timing of his OER input with Mr. X on Monday, June 12, 2006, the applicant submitted a copy of an office calendar, which indicates that Mr. X was on annual leave only from Tuesday, June 13, 2006, through Friday, June 30, 2006. The applicant alleged that on June 12, 2006, he was notified by message that he was in the zone for selection for promotion and “immediately made his rating chain aware of this situation and started preparing my OER.” The applicant argued that he submitted his OER input on June 27, 2006, and that the fact that Mr. X was on leave at the time was immaterial.

The applicant also alleged that he was only in the office 25% of the time since he was in the field conducting inspections 75% of the time. He argued that since Mr. X never accompanied him on his field inspections, Mr. X was not able to accurately assess his performance.

Regarding CDR Y’s affidavit, the applicant stated that it reveals that CDR Y was concerned about the applicant’s declining performance and yet failed to counsel him about it, as required by regulation. The applicant asked how he could have received high marks in his prior OER at Xxxxx if his attitude were truly as CDR Y alleged. The applicant also pointed out the similarities between CDR Y’s affidavit and CAPT B’s affidavit and alleged that the similarities suggest that they were not independently written.

APPLICABLE REGULATIONS

OES Policies

Article 10.A.1.b. of the Personnel Manual provides the following policy:

1. Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command. To that end, performance evaluation forms have been made as objective as possible, within the scope of jobs and tasks performed by officers. In using the Officer

Evaluation Form, CG-5310 (series), strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.

2. Individual 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.1.c.5. provides the following policy regarding performance feedback:

No specific form or forum is prescribed for performance feedback except for ensigns and lieutenants (junior grade). Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g. through on-the-spot comments). Regardless of the forum, each officer should receive timely counseling and be clear about the feedback received. If the feedback is not fully understood, it is the Reported-on Officer's responsibility to immediately seek clarification and the rating chain's responsibility to provide it.

Article 10.A.1.d.1.d. states the following:

Performance feedback is an essential part of every officer's career development. Performance feedback by use of the OSF is the prescribed format for ensigns and lieutenants (junior grade). However, rating chains are strongly encouraged to provide timely performance feedback during and at the end of each reporting period for all officers. Rating chains are strongly encouraged to provide a copy of the completed OERs to reported-on-officers prior to submission of the OERs to OER administrators.

Command Responsibilities

Article 10.A.2.b.2.g. states that it is the responsibility of each commanding officer to “[e]ncourage supervisors and reporting officers to properly counsel subordinates by providing them timely feedback at the end of each reporting period and providing copies of completed OERs to them prior to submission to the OER administrator.”

Article 10.A.2.b.2.i. states that it is the responsibility of each commanding officer to

[o]btain formal training from Commander (CGPC-opm) or Commander (CGPC-rpm) for civilian employees of the Coast Guard who must perform the duties of either Supervisor or Reporting Officer. 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.

Rating Chain Responsibilities

Article 10.A.2. provides that a “rating chain” includes the reported-on officer himself; his supervisor, who is normally the person to whom the reported-on officer reports on a daily or regular basis; his reporting officer, who is normally the supervisor's supervisor; and the reviewer, who is normally the reporting officer's supervisor.

Article 10.A.2.c.2. includes the following among an officer's responsibilities regarding his own performance and performance evaluations:

- c. As necessary, seeks performance feedback from the Supervisor during the period.
- d. Prepares OER Section 1, Administrative Data, and Section 13, Return Address (found on page 4 of the OER form), and forwards the OER with proposed OER attachments to the Supervisor not later than 21 days before the end of the reporting period.
- e. May submit to the Supervisor not later than 21 days before the end of the reporting period a listing of significant achievements or aspects of performance which occurred during the period. Submission is at the discretion of the Reported-on Officer, unless directed by the Supervisor. ...
- f. Notifies the Supervisor not later than 21 days before the end of the reporting period if the Reported-on Officer desires an end-of period conference. ...
- j. Reviews COMDTINST 1401.4 (series), COMDTINST 1401.5 (series) and COMDTINST M1500.10 (series) and manages performance to ensure that OERs are not delayed when eligible for promotion or applying for advanced training.
- k. Assumes ultimate responsibility for managing own performance, notwithstanding the responsibilities assigned to others 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

- e. Provides timely performance feedback to the Reported-on Officer upon that officer's request during the period, at the end of each reporting period and 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.
- g. Finalizes the optional OSF worksheet, if used; Articles 10.A.6.d. and e.
- h. Prepares the Supervisor's sections (2-6) of the OER; Article 10.A.4.c
- i. Initiates an OER if the Reported-on Officer is unavailable, unable, or unwilling to perform in a timely manner. Forwards the OER, the OSF worksheet (if used), OER attachments, and any other relevant performance information to the Reporting Officer not later than 10 days after the end of the reporting period.

Article 10.A.2.e.2. states that a reporting officer

- b. Describes the demonstrated leadership ability and the overall potential of the Reported-on Officer for promotion and special assignment such as command. Prepares Reporting Officer sections of the OER; Article 10.A.4.c.
- c. Ensures the Supervisor fully meets responsibilities for administration of the OES. Reporting Officers are expected to hold designated Supervisors accountable for timely and accurate evaluations. The Reporting Officer shall return a report for correction or reconsideration, if the Supervisor's submission is found inconsistent with actual performance or unsubstantiated by narrative comments. ...
- e. Initiates an OER if the Supervisor does not perform in a timely manner. Ensures the OER is forwarded to the Reviewer not later than 30 days after the end of the reporting period.
- f. Provides timely performance feedback to the Reported-on Officer at the end of each reporting period and at such other times as the reporting officer deems appropriate.

Article 10.A.2.f.2. states that the reviewer of an OER

- c. Ensures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and written comments. However, the Reviewer may not direct in what manner an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.).

- d. Counsels Reporting Officers whose evaluation habits deviate significantly from the prescribed procedures. Deficiencies in OES performance on the part of Reporting Officers and Supervisors should be noted for performance feedback and considered in the respective officers' OERs.
- e. Expedites the reviewed report in a reasonable time to permit the OER Administrator to ensure the OER is received by Commander (CGPC-opm-3) or Commander (CGPC-rpm) 45 days after the end of the reporting period.

OER Submission Schedule

Article 10.A.3.a.1. provides that a lieutenant's regular annual evaluation period ends on May 31. Article 10.A.3.a.3. provides that the detachment of a reported-on officer from his unit on permanent transfer orders is also an occasion for a regular OER. Article 10.A.3.a.1.b.(2) of states that an annual OER is optional if

[a] regular OER will be submitted within the 182 days following the scheduled due date for annual reports or 92 days for semiannual reports. Exception: Those officers above zone, and in zone, for promotion as specified by ALCGOFF promulgated by Commander, (CGPC-opm) shall not delay their regular annual or semiannual OER past the scheduled due date, unless the Reported-on Officer has an approved retirement letter or voluntary resignation on file, and is planning on submitting an OER for continuity purposes only. For officers who meet this criteria, a waiver must be obtained as provided in Articles 10.A.3.a.5.b. and 10.A.3.b.

Article 10.A.3.a.3.a. provides that a regular OER upon the occasion of a reported-on officer's detachment from a unit on transfer orders is optional "if the previous regular reporting period ended ... within the last ... 182 days for officers with annual submission schedules."

Specific Instructions for Completing OER Sections

Article 10.A.4.c.1. states that the reported-on officer must complete all the blocks in section 1 of the OER form and submit it to his supervisor "no later than 21 days before the end of the reporting period. The Reported-on Officer is responsible for the accuracy of the information and the appropriate form for the grade."

Article 10.A.4.c.1.j. provides the following instructions for completing block i in section 1 of an OER, which is supposed to show the start and end dates of the evaluation period:

The regular reporting period commences the day after the ending date of the previous regular OER ... and ends on the date of the occasion for the current report. ... Elapsed time between permanent or temporary duty stations (in transit, on leave, hospitalized, etc.) shall be accounted for in the next period of report and noted in section 1.h., Days Not Observed.

Article 10.A.4.c.1.m. states that block l in section 1 of an OER shall show "[t]he date the Reported-on Officer submits the OER form to the Supervisor."

Article 10.A.4.c.2.a. states that a supervisor should complete section 2 of an OER by writing "a summary of the most important aspects of Reported-on Officer's job. Primary duties, collateral duties, special projects, key processes, and customer and supplier identities should be included. Use a common sense approach to describe the most important duties in a manner that will be understandable to a reader unfamiliar with the officer's job."

Article 10.A.4.c.4. provides the following instructions for completion of the supervisor's portions of an OER, which include thirteen performance categories and limited space for supporting comments. Article 10.A.4.c.7. provides almost similar instructions for how the reporting officer should complete the last five performance categories and the corresponding comment section on an 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.

• • •

g. A mark of four represents the expected standard of performance. Additional specific performance observations must be included when an officer has been assigned a mark of five or six to show how they exceeded this high level of performance. Those assigned the superlative mark of seven should have specific comments demonstrating how they exceeded the six standard block.

Article 10.A.4.c.8. states that the reporting officer completes the "comparison scale" in section 9 of an OER by "fill[ing] in the circle that most closely reflects the Reporting Officer's ranking of the Reported-on Officer relative to all other officers of the same grade the Reporting Officer has known. NOTE: This section represents a relative ranking of the Reported-on Officer, not necessarily a trend of performance. Thus, from period to period, an officer could improve in performance but drop a category."

Article 10.A.4.c.9.a. states that in section 10 of an OER, "[t]he 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."

ALCGPERSCOMs

ALCGPERSCOM 025/06, which was issued on April 13, 2006, stated the following in pertinent part:

1. As scheduled, the majority of officer evaluation reports (OERs) will arrive at CGPC-opm/rpm between May and Sep. In preparation for the promotion year 2007 (PY07) board and panel season, the following info is provided for planning purposes. Preliminary zone sizes are based upon historical averages and should not be construed as official PY07 zone sizes. These zone sizes are

maximum estimates. Actual zones will be published upon COMDT approval of the Officer Corps Management Plan (OCMP) and will generally be smaller than the projected zone sizes.

2. For planning purposes, the estimated active duty promotion list (ADPL) zone sizes are as follows: ... LCDR sel[ection]: LT's with SIGNO less than/equal to 3239 (2005) / 2970 (2006).

ALCGPERSCOM 035/06, issued on June 8, 2006, announced the official zone sizes for the 2006 selection boards (promotion year 2007). It stated that the zone size for the LCDR selection board, which was to convene on August 21, 2006, would consist of the 267 lieutenants from signal number 2696 "down to and includ[ing] [the applicant's name], SIGNO 2976."

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 concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. Article 10.A.1.b.1. of the Personnel Manual provides that "Commanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command." The applicant alleged that the disputed OER is erroneous and unjust and asked the Board to remove it from his record. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by a "misstatement of significant hard fact," factors that "had no business being in the rating process," or a "clear and prejudicial violation of a statute or regulation."¹ The Board must begin its analysis by presuming that the disputed OER is correct as it appears in the record, and the applicant bears the burden of proving by a preponderance of the evidence that it is erroneous or unjust.²

3. The applicant alleged that the mark of 3 he received for "Evaluations" in the disputed OER and the supporting comment about his OER input are erroneous and unfair. He alleged that his input was timely pursuant to an oral agreement he had with his supervisor and that his input met the stated requirements of his rating chain. In support of his allegations, the applicant submitted an office calendar that apparently shows what dates his supervisor, Mr. X, planned to be on leave and the applicant's "PCS Departing/Separation Worksheet." The latter shows that on May 4, 2006, the applicant and Mr. X concurred in a departure date of July 14, 2006, for the applicant's transfer to another unit. Neither document proves that Mr. X verbally agreed that the applicant's evaluation period would end on July 14, 2006, or that Mr. X waived the regulatory deadline for the applicant's OER input.

4. Under Article 10.A.3.a. of the Personnel Manual, unless the applicant was to be "in the zone" for selection for promotion in 2006, the applicant's command had the choice of preparing a regular annual OER with an end date of May 31, 2006, or preparing a regular "Detachment of Officer" OER with an end date of July 14, 2006. With an end date of May 31,

¹ *Germano v. United States*, 26 Cl. Ct. 1446, 1460 (1992); *Hary v. United States*, 618 F.2d 704 (Ct. Cl. 1980); CGBCMR Dkt. No. 86-96.

² 33 C.F.R. § 52.24(b).

2006, the applicant's last six weeks of work at the unit would not be reflected on the OER, so the applicant apparently desired that July 14, 2006, be the end date for the disputed OER. Because he was not included in the preliminary estimate of the zone provided in ALCGPERSCOM 025/06 on April 13, 2006, the applicant could not have known in May 2006 that the end date of his OER would have to be May 31, 2006. But since the preliminary estimated zone size was in the hundreds and his signal number was just six places out of the estimated zone, he knew or should have known that there was a significant possibility that he would be "in the zone" when the actual zone size was determined. In choosing the later end date for the disputed OER, the applicant assumed the risk of running into deadline problems if he ended up being "in the zone."

5. The applicant's supervisor, Mr. X, denied that he expressly agreed to an end date of July 14, 2006, for the disputed OER, but admitted that he "did agree to defer the OER submission, if permitted by Chapter 10 of the PERSMAN." Under Articles 10.A.2.d.2.i. and 10.A.2.e.2.e. of the Personnel Manual, if a reported-on officer fails to initiate an OER when the command believes that one is due, the supervisor and the reporting officer are charged with initiating the OER themselves. Since neither Mr. X nor CDR Y initiated an OER with an end date of May 31, 2006, the Board finds that even if they did not expressly agree that July 14, 2006, would be the end date, they certainly acquiesced in the applicant's choice of the later end date. Neither Mr. X nor CDR Y claims to have given the applicant any express instruction about choosing May 31 instead of July 14, 2006, as the end date, and either date was permissible under Article 10.A.3.a. of the Personnel Manual until the applicant was included "in the zone" on June 8, 2006, when ALCGPERSCOM 035/06 was issued.

6. With an expected evaluation period end date of July 14, 2006, under Article 10.A.2.c.2.d. of the Personnel Manual, the applicant's OER input was due at least 21 days earlier, or by Friday, June 23, 2006. The applicant failed to submit his OER input to Mr. X by that date, and so his OER input was late. Moreover, the applicant must have known well in advance that his supervisor was taking leave during the last three weeks of June. Nevertheless, he apparently made no provision for submitting his OER input so that Mr. X would have 21 days to work on it. After seeing his name "in the zone" in ALCGPERSCOM 035/06, which was issued on June 8, 2006, the applicant may have told Mr. X just before he left on vacation that the applicant's OER input would be on Mr. X's desk upon his return in July. Such a scenario, however, does not mean that Mr. X actually waived the applicant's deadline or agreed that he would consider OER input submitted on June 27 or July 5, 2006, to be timely under the Personnel Manual, and Mr. X strongly denies having reached such an agreement. In light of these circumstances, the Board finds that the applicant has not proved by a preponderance of the evidence that his rating chain verbally agreed to waive the requirement in Article 10.A.2.c.2.d. of the Personnel Manual that he submit his OER input to his supervisor at least 21 days before July 14, 2006.

7. Even if the applicant's submission of his OER input after the 21-day deadline were considered harmless error because his supervisor was on vacation when the deadline passed, the mark of 3 in "Evaluations" and the supporting comment were also based on the quality of the applicant's input. The applicant's rating chain indicated that the applicant's draft OER was poorly written and submitted on the wrong form and that they expected him to submit supporting documentation pursuant to Article 10.A.2.c.2.e., which he failed to do. The applicant submitted nothing to support his allegation that his OER input was of good quality or that his command did not request or expect supporting documentation, as is common. The applicant did

not even submit a copy of his OER input to the Board. In the absence of evidence to the contrary, the Board must presume that the rating chain's assessment of the applicant's OER input was accurate.³ Although the applicant complained that he was not timely counseled about the mark of 3, any such counseling could not reasonably have occurred until after the applicant had earned the mark of 3 by failing to meet his responsibilities under the OES, and so the lack of counseling about the mark of 3 cannot have negatively affected the OER. In light of (a) the fact that the applicant did not meet the 21-day deadline for the anticipated July 14, 2006, end date for the disputed OER; (b) his use of the wrong OER form in submitting his input; and (c) the poor quality of his OER input, the Board finds that he has failed to prove by a preponderance of the evidence that the mark of 3 he received in "Evaluations" or the supporting comment about the deficiencies of his OER input are erroneous or unfair.

8. The applicant alleged that his supervisor erroneously and unfairly changed the date of his OER input in block 1.1. of the disputed OER from June 27, 2006, to July 5, 2006. Article 10.A.4.c.1.m. of the Personnel Manual states that block 1.1. of an OER shall show "[t]he date the Reported-on Officer submits the OER form to the Supervisor." The applicant submitted to the Board an "OER Routing Slip" and a copy of an email indicating that his draft OER was "submitted"—in the sense that it would have been available for Mr. X to review had Mr. X not been on leave—on June 27, 2006. The regulation is silent about whether "submits" connotes a reasonable expectation of prompt receipt by the supervisor. However, Mr. X and CDR Y stated that the form that the applicant emailed to Mr. X on June 27, 2006, was the wrong form, and the applicant has not denied it. Under Article 10.A.4.c.1., the applicant, as the reported-on officer, was responsible for using the correct form to initiate the OER. Therefore, the Board is not persuaded that the applicant completed his duty under that article on June 27, 2006, when he emailed his input to Mr. X on the wrong form. In light of these circumstances, the Board finds that the applicant has not proved by a preponderance of the evidence that the date July 5, 2006, in block 1.1. constitutes a "misstatement of significant hard fact,"⁴ or that it is erroneous or unfair as the date of the applicant's OER input. Furthermore, the Board notes that even if the July 5, 2006, date were deemed erroneous, it would be harmless error since either date of submission reveals the applicant's violation of Article 10.A.2.c.2.d. of the Personnel Manual.

9. The applicant alleged that sections 2 and 3 of the disputed OER are erroneous in describing him as a "PEAT Member" rather than a "PEAT Leader," as CDR Y wrote in section 7 of the OER, and that section 2 also erroneously fails to indicate that he was a "Senior Duty Investigator/Inspector," rather than just a "Duty Investigator/Inspector." Mr. X, however, denied that such designations even existed. CDR Y's comment about the applicant being a PEAT Leader in section 7 does not persuade the Board that such a designation actually existed or that the applicant was entitled to it. The applicant has submitted no evidence to prove that the requested designations existed or that he received them. He has not proved that the disputed OER is erroneous in referring to him as a PEAT Member and a Duty Investigator/Inspector.

10. The applicant alleged that the OER is inconsistent in that the written comments could support higher numerical marks. In particular, he alleged that written comments in the OER support a mark of 6 in the category "Health and Well-Being" and a mark as an "excellent

³ 33 C.F.R. § 52.24(b).

⁴ *Germano*, at 1460.

performer” in the fifth spot on the comparison scale. Under Articles 10.A.4.c.4. and 10.A.4.c.7. of the Personnel Manual, the rating chain is not supposed to write comments about an officer’s performance and then assign marks that reflect the comments. Instead, the rating chain is supposed to compare the officer’s observed performance to the performance standards printed above the numerical scales on the OER form and select the numerical marks that best describe the officer’s performance with respect to the printed standards. The rating chain’s comments are supposed to cite specific examples of the officer’s performance that are consistent with the assigned numerical marks. Although the comments in the disputed OER show that the applicant completed a substantial amount of significant work during the course of the year, none of the rating chain’s comments is so laudatory as to demand a higher numerical mark in a corresponding performance category. CDR Y has explained that his comment that the applicant maintained an “exceptional military appearance” supported the mark of 5 he assigned the applicant in the category “Professional Presence,” rather than the 4 he assigned the applicant for “Health and Well-Being.” Nor are the marks or comments in the disputed OER so laudatory as to prove that the “good performer” mark that CDR Y assigned to the applicant on the comparison scale is erroneous or unfair.

11. The applicant alleged that the disputed OER is unfair because the marks are lower than those he received in his prior OER and he was never counseled during the evaluation period about any decline in his performance so he did not have a chance to improve his performance to earn the higher marks he expected. The disputed OER, however, is an evaluation of the applicant’s performance at a new position under a new supervisor. The fact that the applicant received many marks of 5 and 6 on his prior OER, which covered his work under the senior investigating officer in the Investigations Department at Sector Xxxxx, does not prove that the marks of 4 and 5 he received for his work under Mr. X in the Inspections Department are erroneous or unfair. Articles 10.A.1.c.5., 10.A.2.c.2.c., and 10.A.2.c.2.k. of the Personnel Manual place the primary onus for performance feedback during the evaluation period on the reported - on officer himself. Articles 10.A.2.d.2.f. and 10.A.2.e.2.f. require the supervisor and the reporting officer to initiate performance counseling during the evaluation period only when they deem it “appropriate.” Mr. X and CDR Y stated in their affidavits that they did not deem performance counseling appropriate during the evaluation period because the applicant was meeting or exceeding the expected high standards of performance, and they did not deem his failure to exceed more of those high standards to a greater extent as sufficient reason to counsel him about his performance. The Board finds that the Personnel Manual does not require rating chain members to counsel an officer because his performance is good rather than excellent. The applicant argues, in essence, that the regulations required his new supervisor, Mr. X, to review his prior OER and inform the applicant that, while his performance was quite good and met the expected standards, he was not quite as impressed with the applicant’s performance as his prior supervisor in another office had been. However, no part of the Personnel Manual requires rating chain members to keep such careful track of what OER marks each subordinate officer has previously earned and come to expect and to warn them when their performance is earning good but not quite as good marks. Given the wording of Article 10.A.2.d.2.f. of the Personnel Manual, the Board is not persuaded that Mr. X’s failure to counsel the applicant about his job performance during the evaluation period constituted a clear violation of the regulation.

12. Since the reporting officer, CDR Y, had served on the applicant’s rating chain for his prior OER, he may have been better situated than Mr. X to notice that the applicant’s per-

formance as a marine inspector was not as good as his performance as an investigator had been. CDR Y's affidavit indicates that he thought the applicant was doing "enough to get by and no more." CDR Y could have warned the applicant about this perception but did not because the applicant was at least meeting the expected standards of performance in each performance category. The question is whether the rating chain had a duty to provide performance counseling even though the applicant was meeting the expected standards of performance on the OER form. Given the wording of Article 10.A.2.e.2.f. of the Personnel Manual, the Board is not persuaded that CDR Y's failure to counsel the applicant about his job performance during the evaluation period constituted a clear violation of the regulation.

13. In his application, the applicant complained about the fact that his rating chain did not complete the disputed OER within the deadlines provided in the Personnel Manual. Given that the applicant's own tardiness in submitting his OER input and his use of the wrong form denied the rating chain the normal time to prepare an OER, the Board finds that any deadlines missed are attributable at least in part to the applicant. Moreover, since the disputed OER was entered correctly in his record before the selection board convened, any failure on the part of his rating chain to meet the deadlines was harmless.

14. The applicant alleged that his rating chain failed to counsel him about the disputed OER after it was completed and before it was submitted to CGPC. Such end-of-period counseling is "strongly encouraged" under Article 10.A.1.d.1.d. of the Personnel Manual, and is cited as a responsibility of the supervisor and reporting officer in Articles 10.A.2.d.2.f. and 10.A.2.e.2.f. Mr. X and CDR Y indicated that end-of-period counseling was not timely provided because the OER was not completed until July 28, 2006, two weeks after the applicant's detachment from the unit on July 14, 2006. The applicant alleged that he was in contact with Mr. X after he left the unit but before he left Xxxxx and that Mr. X did not provide counseling and only discussed the mark of 3 with him after the applicant received an official copy of the OER from CGPC. The disputed OER was not signed by the reviewer until July 28, 2006, two weeks after the applicant left the unit, and about three weeks before the LCDR selection board was to convene. Under these circumstances, the Board does not fault the rating chain for not attempting to provide the applicant with end-of-period performance counseling before forwarding the OER to CGPC. Moreover, the applicant has not shown how such end-of-period counseling harmed his record. He has not shown that his rating chain would have improved any of the marks or comments in the disputed OER had they discussed it with him before forwarding it to CGPC.

15. The applicant alleged that block 1.i. of the disputed OER should show July 14, 2006, as the end of the evaluation period.⁵ The record suggests that on June 27, 2006, the applicant prepared his OER input with an end date of May 31, 2006; that Mr. X changed the end date to July 14, 2006; and that on August 10, 2006, CGPC corrected the end date back to May 31, 2006. Although the applicant planned to have his evaluation period end on July 14, 2006, and his rating chain apparently acquiesced in that decision, that option was eliminated on June 8, 2006, when the applicant was included "in the zone" in ALCGPERSCOM 035/06 because Arti-

⁵ The applicant also, contrarily, argued that his supervisor's insertion of the July 14 date in block 1.i. revealed his lack of knowledge of the OES. However, because in his original application, the applicant alleged that the disputed OER contains "inaccurate dates" (plural), and the only date he seems to contest besides the date of his OER input is the end date shown in block 1.i., the Board decided to address the correct end date for the OER.

cle 10.A.3.a.1.b.(2) of the Personnel Manual states that “officers above zone, and in zone, for promotion as specified by ALCGOFF promulgated by Commander, (CGPC-opm) shall not delay their regular annual or semiannual OER past the scheduled due date.” Therefore, although the July 14, 2006, end date did not become impermissible until June 8, 2006, when the applicant was included “in the zone,” the Board finds that CGPC did not err by changing the end date in block 1.i. to May 31, 2006, to comply with the requirement in Article 10.A.3.a.1.b.(2).

16. The Board notes that the correction of the end date in block 1.i. to May 31, 2006, makes the date of the applicant’s OER input in block 1.i. appear later than it actually was. This is a foreseeable artifact of the applicant’s having initially opted for the July 14, 2006, end date—despite being just six numbers out of the estimated zone in the preliminary announcement—and of his untimely submission of his input for the July 14 end date. The Board finds, however, that the dates in those blocks are accurate according to regulation, as is the written comment about his OER input being late.

17. The applicant alleged that when his supervisor, Mr. X, completed the disputed OER, Mr. X had not received OES training as a civilian supervisor and did not have the corresponding certification in his record or have rating chain responsibilities included in his core competencies, as required by Article 10.A.2.b.2.i. of the Personnel Manual. The Coast Guard has admitted this violation of the regulation but argued that it was a harmless error because Mr. X received OES training during his long active duty career as a Coast Guard officer before he retired on August 1, 1998. The applicant argued that the error was not harmless because OER regulations have been revised since 1998. He pointed to CGPC’s correction of the end date in block 1.i. as evidence that Mr. X’s lack of OES training as a civilian employee was not harmless. He also asked for proof that Mr. X had in fact received OES training prior to his retirement.

18. Because the Coast Guard has admitted that the applicant’s rating chain violated Article 10.A.2.b.2.i. of the Personnel Manual, the question before the Board is whether the violation was prejudicial to the applicant.⁶ Since certification and inclusion in core competencies are administrative record entries that follow OES training and that could not *per se* negatively affect an OER, only Mr. X’s alleged lack of OES training could have been prejudicial to the applicant by negatively affecting the disputed OER. In his sworn affidavit, Mr. X wrote that he attended formal OES training as a Coast Guard officer prior to his retirement from active duty, and the Board finds that his sworn statement is sufficient to prove this point. While it is true that some OES regulations have been amended since 1998, a supervisor’s instructions for assigning marks and writing comments in an OER have not changed significantly since the Personnel Manual, COMDTINST M1000.6A was first issued in January 1988. In fact, even the prior Personnel Manual, COMDTINST M1000.6, contained essentially the same instructions for assigning marks and writing comments in an OER more than 20 years ago as those currently in effect. The Board also notes that the applicant has not proved that the quality and quantity of his work during the evaluation period was better than as assessed by Mr. X. In light of these facts, the Board finds that the applicant has failed to prove that the Coast Guard’s violation of Article 10.A.2.b.2.i. of the Personnel Manual was prejudicial to him or to the disputed OER.

⁶ *Germano*, at 1460.

19. In his response to the advisory opinion, the applicant argued that Mr. X should not have served as his supervisor because the applicant was performing inspections in the field 75% of the time and so his performance was not being observed by Mr. X. However, Mr. X was the Chief of the Inspections Division in which the applicant worked, the applicant reported to him during the evaluation period, and the applicant has not shown that there was any other officer or employee of the Coast Guard more suitably placed to evaluate his performance as an inspector.

20. Accordingly, the applicant's request should be denied because he has failed to prove that the disputed OER was adversely affected by a "misstatement of significant hard fact," factors that "had no business being in the rating process," or a "clear and prejudicial violation of a statute or regulation."⁷ Because he has not proved that the disputed OER is erroneous or unjust, there is no basis for considering his request for removing his failure of selection for promotion to LCDR in August 2006.⁸

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁷ *Id.*

⁸ Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), an applicant's failure of selection should be removed only if he has proved that his record was significantly prejudiced by an error and if it is not unlikely that the applicant would have been promoted in the absence of the error.

ORDER

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

Kathryn Sinniger

Dorothy J. Ulmer

Thomas H. Van Horn