

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-042

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Ulmer, D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application on December 4, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated June 28, 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

The applicant asked the Board to correct his military record by removing a special officer evaluation report (SOER)¹ for the period from June 9, 2004, to February 18, 2005, and replacing it with a report for continuity purposes only.

The Special OER

The SOER covers a period when the applicant was the operations officer (OPS) at a newly created Maritime Safety and Security Team (MSST) unit. It was submitted pursuant to Article 10.A.3.c.1.a. of the Personnel Manual to document performance that was notably different from the previous reporting period and to document the reporting officer's loss of confidence in the applicant's ability to effectively perform assigned duties. Section 2. of the SOER also comments that pursuant to Article 10.A.4.h.1.c., the report is derogatory and notes that the applicant was removed from his primary duties on February 18, 2005.

¹ Special OERs are exceptions to other OERs and may be directed by the Commandant, commanding officers, higher authority in the chain of command, or the reporting officer to document certain performance or events identified in Article 10.A.3.c. of the Coast Guard Personnel Manual.

As recorded in section 2. of the SOER, the applicant was responsible for the leadership, training, performance, and readiness of all active duty boat forces, law enforcement operators, and for the unit's eleven vehicles, six 25 foot defender class boats, and weapons. He Leads two lieutenants junior grade (LTJGs), one chief warrant officer, one senior chief petty officer, three chief petty officers, and sixty petty officers. He was also responsible for formulating strategies for all unit security operations.

The evaluated performance on the SOER consists of three parts: the supervisor's portion, the reporting officer's portion, and the reviewer's portion. Under performance of duties in the supervisor's portion of the SOER, the applicant received a mark of 4 in adaptability; marks of 3 in planning and preparedness, using resources, and professional presence; and a mark of 2 in results/effectiveness.² In support of the below average marks in this section of the SOER, the supervisor wrote:

[The applicant] consistently failed to set priorities for self & subordinates to meet deadlines & on numerous occasions failed to provide CMD w/plan of attack for admin & op tasks; during units stand up trng phase mbr was tasked w/providing cmd w/frequent updates on unit's trng status. Only made effort when approached by CO/XO, failed to submit unit OPSUM in a timely manner. Did not assign project officer for ops mission while on leave; failure to meet CMD expectations have resulted in several unit delays & CO/XO intervention to ensure CMD requirements were met. Quickly adapted to delays in trng schedule when faced w/four hurricanes hitting AOR; . . . Effectively used benchmarks only after repeated interventions by CMD; during units standup phase weapon quals status not racked/executed in timely manner until CO placed pressure on mbr. Despite multiple counseling sessions by CO/XO, mbr's performance of duties did not reflect a consistent increase in improvement; causing CMD to question his integrity & dedication. Unit was the only MSST to meet all prerequisites prior to arrival to CG Special Missions Trng Ctr, as well as unit successfully passed Ready for Operations eval; did play a big part in Unit's success, however, required constant coaxing to provide status & progress reports; did not take own initiative to keep CMD informed.

In the communication skills section of the SOER, the supervisor gave the applicant a mark of 3 in speaking and listening and a mark of 2 in writing. In support of these below average marks, the supervisor wrote:

Effectively expressed ideals & facts to crew, his non-verbal actions were inconsistent w/message. During muster, staff & operations briefs facial & body language expressed disapproval of CMD's vision. Most of written reports & correspondence were incomplete or lacked thorough review prior to submission; OPSUM format, enl evals, qual ltrs, P7s, & memos consistently returned for revision/grammatical/formatting corrections; negatively impacting units timely

² Marks on an OER are from a low of 1 to a high of 7. A 4 is considered to be an average mark.

submission schedules & causing CMD to unnecessarily divert from other unit priorities.

In the leadership skills section of the SOER, the supervisor gave the applicant marks of 4 in looking out for others and workplace climate; marks of 3 in developing others, directing others, and teamwork; and a mark of 2 in evaluations. In support of the below average marks, the supervisor wrote:

Failed to coach subordinates on ops & admin duties; [member] delegated OPSUM responsibility to AOPS w/o guidance/training; failed to review AOPS product prior to submission to CMD; OPSUMs consistently returned w/ recurring errors; never notified CMD of change in ops reporting requirement; recurring errors & unknown changes caused OPSUMs to be tardy to LANTAREA . . . Reports were frequently late & of poor quality; required repetitive changes/modifications, impeding CMD's ability to dedicate efforts to other important unit issues. Failed to meet deadlines in submitting enlisted eval[uations] & improperly submitted subordinates' OERs up the chain of command after written e-mail guidance was given. Leave withheld until required eval[uations] were completed.

In the reporting officer's portion of the SOER, he wrote in block 7. that he concurred with the marks and comments of the supervisor. He stated that the applicant was counseled at various stages by the supervisor and himself, and although the applicant showed immediate course correction, he quickly returned to his past habits. The reporting officer noted that the applicant failed to meet his expectations and had lost his trust and confidence.

In the personal and professional qualities section of the SOER, the reporting officer gave the applicant marks of 4 in initiative and health and well-being and marks of 3 in judgment, responsibility, and professional presence. In support of the below average marks, the reporting officer wrote the following:

Exemplified poor judgment coordinating unit's mission requirements prior to departing on [leave], failed to develop game plan & inform chain of CMD as to personnel mission delegation; knowingly allowed storage of M60 machine gun in unauthorized safe/facility w/o CMD input approval; resulted in CO taking control of mission & properly stowing weapon. Unethically submitted travel claims; attempted to submit claims w/full knowledge of inappropriate reimbursements; confronted by CO/XO on two separate occasions & asked to modify one claim to accurately reflect actual expenditures & to adhere to CG policy; actions resulted in violating CG Core Values. Conveyed poor image of self & CMD; displayed uncooperative or dissenting gesture w/implementing unit objectives during staff & ops meetings; actions hindered CMD's effectiveness. Relieved of primary duties for repeated failure to perform to expected level.

On the comparison scale in block 9. where the reporting officer compared the applicant with all other LTs he has known throughout his career, the reporting officer marked the applicant as unsatisfactory, the equivalent of a 1. The mark of 1 made the SOER a derogatory report.

In block 10. the reporting officer did not recommend the applicant for promotion and stated that he was not prepared at that point to assume positions of greater responsibilities. The reviewer authenticated the SOER without comment.

The applicant submitted an addendum to the SOER disagreeing with the marks and characterization of his performance. The rating chain submitted statements in response to the addendum, stating that their evaluation of the applicant's performance was an accurate assessment of his performance for the period under review.

Applicant's Other OERs

The applicant's five prior OERs from December 17, 1999, until the beginning date of the SOER were excellent. In his prior assignments, he served as a staff officer with the law enforcement division of a Coast Guard section. The description of duties on these OERs does not indicate that the applicant was responsible for supervising any personnel. He did not receive any marks lower than 4, and the majority of his marks were 5s and 6s. He was marked in the fifth block to the right in section 9. (the comparison scale) on each of the prior OERs. His prior reporting officers described him as excellent, trustworthy, and a strong leader.

On the OER subsequent to the one in question, the applicant was assigned to duty as the controller, Sector San Juan Command Center. His marks were primarily 5s and 6s and he was assigned a mark in the fifth spot on the comparison scale (block 9). There is no indication that he was responsible for the daily supervision of other personnel.

APPLICANT'S ALLEGATIONS

The applicant alleged that the reporting officer for the SOER, who was also the commanding officer (CO), had not been officially promoted to the grade of LCDR, but was a frocked LCDR. He stated that the XO, who was his rating chain supervisor, was junior in grade. He alleged that the CO had a personality conflict with him and that the XO did not mitigate the conflict. The applicant alleged that the command's objectives were not clear and that he was often left out of command briefs and meetings, which contributed greatly to the unit's confusion.

The applicant alleged that the CO failed to clearly define expectations and tasks. He stated that his ability to direct others was inhibited because of his isolation from the CO and XO. Therefore, he alleged that the following comments are erroneous:

[The applicant] consistently failed to set priorities for self & subordinates to meet deadlines & on numerous occasions failed to provide CMD w/plan of attack for admin & op tasks; during units stand up trng phase mbr was tasked w/providing cmd w/frequent updates on unit's trng status. (SUP)

Effectively used benchmarks only after repeated interventions by CMD; during unit's standup phase weapon quals status not racked/executed in timely manner until CO placed pressure on mbr. (SUP)

Despite multiple counseling sessions by CO/XO, mbr's performance of duties did not reflect a consistent increase in improvement; causing CMD to question his integrity & dedication. (SUP)

[R]equired constant coaxing to provide status & progress reports; did not take own initiative to keep CMD informed. (SUP)

Counseled by XO & CO at various stages during this marking period; CMD provided detailed concerns/issues to mbr & recommended changes to remedy problems; showed immediate course correction but quickly returned to his past habits. (RP)

Failed to meet my expectations of an Operations Officer and has lost my trust & confidence in his ability to support this CMD's initiatives and vision. (RP)

In support of his application, the applicant submitted a statement from LT H who at the time the statement was submitted served as the Waterside Section Detachment Team Leader. He served with and was subordinate to the applicant from June 2004 to January 2005. The applicant quoted the following from LT H's statement:

While standing up the MSST, the command objectives and direction were occasionally unclear. [T]his was a new unit and responsibilities and requirements evolved over time. [T]he [CO] was trying to set defined responsibilities or requirements, but often needed to redefine them as they changed. [The applicant] was often not included in Command briefs or meetings which helped the confusion and turmoil within the crew build. Decisions were made then changed without [the applicant's] knowledge, which hindered [the applicant's] ability to efficiently supervise personnel with the correct goals and timelines. [The applicant] seemed to set priorities and deadlines as best he could within the amorphous environment.

The applicant stated that his prior OERs from other rating chains commented favorably on his attention to detail and his timely updates to the command. He stated that when he sought to give the current reporting officer an update, the reporting officer either became overwhelmed with the information or reacted negatively to it. The applicant quoted LT H as stating "the CO was a difficult person to approach with an issue which often contributed to communications gaps." LT H was further quoted as saying, "the CO . . . appeared to have a personality conflict with [the applicant]."

The applicant contended that the CO's expectations were impossible to meet because after giving directions or defining an objective, he would often change them without the applicant's knowledge. The applicant stated that the CO failed to empower him or to establish open lines of communication. The applicant further stated that there was no established formula for success. He stated that he was included in some meetings but not all and that he was informed of some decisions, which changed often. Therefore, he argued that the command's

expectations were unreasonable and as such they prevented the applicant from having a chance to meet them, resulting in erroneous comments and marks in the SOER.

With respect to the marks and comments about the applicant's writing skills in the communication skills section of the SOER, the applicant stated that the reporting officer's unrealistic writing expectations and requirements increased the time required to complete writing tasks and evaluations. According to the applicant, the CO required that each mark on an evaluation have a descriptive explanation. The applicant stated that the evaluations that he thought were final products would be returned with substantial edits and revisions. He alleged that due to the CO's cumbersome process, evaluations as well as other written documents were frequently submitted late.

The applicant disagreed with the SOER comment, "Inaction to heed counseling has caused turmoil within the Wardroom and CPO mess & has affected unit morale & hampered comms efforts." In this regard, the applicant stated that it was the CO's and XO's lack of leadership that created an environment of confusion that negatively impacted morale.

The applicant alleged that the following block 8. comment shows an obvious personality conflict between the CO and himself because the comments are negative, vague, and unsubstantiated: "Conveyed poor image of self & CMD; displayed uncooperative or dissenting gesture w/implementing unit objectives during staff & ops mtgs; actions hindered CMD's effectiveness."

The applicant alleged that until the reporting officer began evaluating him he was lauded by three different CO's for his leadership, management, and teamwork. He stated that it is "inconceivable that he would suddenly abandon his previously noted work habits and skills at a new command." The only logical explanation for the marks and comments in the SOER is that they were assigned by an inexperienced reporting officer with a personality conflict with the applicant. With respect to the derogatory mark on the comparison scale), the applicant stated that it is clearly out of step with not only his performance at the unit but also the rest of his career.

The applicant concluded his brief with the following argument:

The [CO's] lack of experience rendered him incapable of giving clear and consistent direction to his subordinates and fostered morale issues with the crew. A directive would be given and then changed. The CO was not approachable. This further hampered decision-making and eroded unit cohesion. The arduous writing and revision requirements fueled the frustration within the crew.

[The applicant] got along with the crew and had significant operations experience. The CO saw the morale of the crew wilting and singled out [the applicant] as the person on whom to lay blame. The CO was not fond of him, often excluding him from meetings. This resulted in [the applicant] not having the most current information when directing personnel. He was set up for failure rather than empowered for success.

[The applicant's] record should be corrected by (1) voiding and removing the disputed SOER and all associated documents from his PDR; (2) replacing the disputed SOER with a continuity report in time for his corrected record to be properly reviewed by his O-4 selection board; and (3) granting such other and further relief as may in the circumstances be just and proper.

VIEWS OF THE COAST GUARD

On May 1, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request.

The JAG stated that to establish that an OER is erroneous or unjust, an applicant must prove that the challenged OER was adversely affected by a clear error and prejudicial violation of a statute or regulation, or alternatively, a misstatement of a significant hard fact. *Germano v. United States*, 26 Ct. Cl. 1446, 1460 (1992). The JAG stated that in proving his case, the applicant must overcome the presumption that his rating chain officials acted correctly, lawfully, and in good faith in making their evaluations under the officer evaluation system. *Arens v. United States*, 969 F.2d 1034, 1037 (1992). The JAG further stated that the applicant can rebut the presumption by producing "cogent and clearly convincing evidence." *Muse v. United States*, 21 Cl. Ct. 592, 602 (1990).

With respect to the applicant's argument that the SOER is inconsistent with his prior and subsequent performance, the JAG argued that the contents of the SOER pertain only to the period at issue. The JAG stated the applicant was evaluated against the standard set forth on the OER form and not prior performance. The fact that he received better ratings and personal awards before and after the disputed SOER is irrelevant to the matters before the Board. See, *Grieg v. United States*, 640 F. 2d 1261, 1269 (Ct. Cl. 1981). (stating that "the fact this fine officer had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied.")

The JAG stated that the one statement from LT H, who was the applicant's subordinate, is insufficient to prove that the rating chain was biased against the applicant. The JAG adopted the comments from Commander, Coast Guard Personnel Command (CGPC) as part of the advisory opinion. CGPC offered the following:

The applicant reported to [the unit] in July 2004 following two consecutive tours as a staff officer at U.S. Coast Guard Greater Antilles Section (GANTSEC). The record shows that the applicant received marks consistent with good performance while at GANTSEC. However, the duties and responsibilities of the operations officer at an operational unit such as a MSST are significantly different than those of a staff officer at a larger command such as GANTSEC. While the member excelled in his duties at GANTSEC, the challenge of being the operations officer during the stand-up of a MSST appears to have been too demanding for the applicant. If an officer performs well during a previous assignment, it does not guarantee the officer will do well at every subsequent assignment. The previous

assignment is only relevant as a reference point to show that the applicant performed at a lower level as documented in the OER.

Following his transfer from MSST, the applicant was assigned to Coast Guard Sector San Juan, Puerto Rico (formerly GANTSEC). The applicant's first OER in the new staff job illustrated that the applicant was well suited to continue working as a staff officer at a larger command, but it does not provide evidence of any irregularity on the part of [the reporting officer] and it is not relevant to the applicant's special OER, since it is beyond the relevant period.

The record shows that regular meetings were held within the command element, and specifically with the applicant to clarify and prioritize expectations and tasks . . . As a subordinate to the applicant, it appears that [LT H] was not privy to all interactions between the command and the applicant and therefore not fully aware of all conversations between [the reporting officer/supervisor] and the applicant . . . Furthermore, [LT H's] credibility is somewhat diminished because he also experienced performance problems at MSST and was eventually removed from his primary duties.

The applicant also suggested that [the reporting officer and the supervisor] lacked experience and the background to effectively evaluate him. The applicant provides no evidence to support his claim. Both [the reporting officer & supervisor] were fully qualified to carry out the duties and responsibilities of their respective positions.

The Coast Guard obtained sworn statements from the supervisor and reporting officer and a declaration from the reviewer.

1. The supervisor stated that the evaluation in the SOER is accurate. She wrote that she and the applicant had daily 0615, 0900, and 1100 meetings with the reporting officer during the initial stand up phase, as well as afternoon staff meetings with all E-7s and above to facilitate open communication and delineate/receive status updates on unit goals/objectives. The supervisor stated that throughout the seven-month period, she provided constructive feedback on the applicant's performance of duties. She stated that she formally counseled him on January 13, 2005. She stated that the applicant failed to meet certain performance standards and expectations laid out in the OER dimensions. As an example, the supervisor stated that the applicant's written product constantly included many misspellings, that his memoranda did not follow correspondence manual guidelines, and that his letters did not follow the template in the Commandant's Instruction Manuals.

With respect to LT H's statement, the supervisor stated that on September 29, 2006, LT H was relieved of his duties and responsibilities as MSST Miami Deployable Team Leader because the command had lost trust and confidence in him due to a series of poor decisions and questionable behavior. She noted that he was found to have violated Article 92 (disobeying a lawful order) and Article 133 (conduct unbecoming an officer and a gentleman) of the Uniform Code of Military Justice at non-judicial punishment (captain's mast).

The supervisor stated that according to the planning officer and the CO, during staff meetings, etc., the applicant would exhibit body language and expressions that showed his disapproval of her tasking and/or guidance in front of other officers, such as rolling his eyes, when she was not looking. She stated that the applicant denied that he had engaged in the behavior when he was approached about it, but when the applicant's behavior continued, the CO counseled him about it.

2. The reporting officer wrote that he was confident that the applicant's SOER is completely factual, objective, and an accurate reflection of the applicant's performance for that period. He stated that at the time he was a frocked LCDR, but denied that he did not have an operational background. In this regard, the applicant stated that prior to his assignment as the CO of the unit under discussion, he served as the plank owner XO for another MSST, and prior to that assignment he served as the assistant OPS at an MSO. In addition he stated that he had served in several other leadership positions in the operational community.

The reporting officer stated that the applicant was always a part of command briefs and that he met with the applicant separately on several occasions to provide further detailed guidance as to his expectations and how the applicant could meet them.

The reporting officer denied that he had a personality conflict with the applicant. He stated that "[e]nsuring anyone's failure does not bode well in attaining the team's goals and objectives."

The reporting officer stated that he had high writing standards, but that it was not impossible to meet them. He stated that he and the XO offered to personally assist the applicant with his writing and to provide him with writing references. He stated that the applicant never sought to take advantage of their offer of assistance and continued to submit sub-par work from himself and his subordinates.

The reporting officer stated that he maintained an open door policy and the applicant's assertion that he was not approachable is subjective.

The reporting officer noted that LT H had problems similar to those of the applicant while he was CO, but LT H took heed of the counseling provided by the XO and himself and subsequently improved. He further stated that it has come to his attention that LT H was subsequently removed from his primary duties for reasons similar to those of the applicant (loss of confidence, etc).

3. The reviewer stated that he believes the SOER accurately reflects the applicant's performance. He further stated that in his opinion, the SOER was not based on any biases in the applicant's rating chain.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 4, 2007, the Board received the applicant's reply to the views of the Coast Guard. He stated that his application provides clear evidence that the disputed SOER was the product of the reporting officer's biased view of the applicant, his culture, and his family values. He alleged that on several occasions, the reporting officer made disparaging comments to the applicant about how the applicant accomplished certain tasks. The applicant also alleged that the reporting officer showed distaste for him by accusing him of working with the "Puerto Rican mafia." He also alleged that the reporting officer discriminated against the applicant's planning officer who was also Puerto Rican.

The applicant stated that his other OERs were provided to show the irregular marks in the disputed SOER, his vast operation background, and the demanding environments in which he excelled. The applicant also noted that he was enlisted as a small boat coxswain for eight years and did two years of force protection and security prior to becoming an officer.

The applicant stated that although the advisory opinion attempted to refute his argument that the reporting officer and supervisor lacked operational experience, he noted that the XO was an Academy graduate with only two previous tours of duty, which consisted of a two year tour on a cutter followed by four years at the Marine Intelligence Center. He stated that the CO came from the Marine Safety field and prior to arriving at MSST Miami, he was the XO at the MSST in San Pedro, CA for two years. The applicant further stated:

The MSST's command cadre, as the program is designed, should have been composed with (1) the CO having an operations background, (2) the XO having a marine safety background, and (3) the operations officer having an operations background. That was not the case at the Miami MSST. The Coast Guard was doing a test in New Orleans and Miami where officers with Marine Safety backgrounds were placed in CO positions. This did not work for the Coast Guard. The proof was revealed to [the applicant] when he was at a road show and a LCDR asked the assignment officer about the CO positions at the MSSTs. The assignment officer said "the members selected for MSST command positions have to have small boat experience and operations background because we [the Coast Guard] have had problems with some of the MSSTs that don't have that type of leadership."

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.
2. 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.”³ The Board begins 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.⁴ For the reasons discussed below, the Board finds the applicant has failed to meet his burden of proof.

3. The applicant alleged that certain comments in the SOER about his failure to set priorities, to meet deadlines, to keep the command updated/informed, and to meet the CO’s expectations resulted from the CO’s and XO’s failure to define their expectations and tasks and from the fact that he was isolated from the CO and XO which inhibited his ability to direct others. As proof, in addition to his own allegation, the applicant offered the statement of LT H who was the applicant’s subordinate during the period covered by the SOER. To his credit, LT H recognized that the MSST was a new unit and that the CO’s responsibilities and requirements would evolve over time and would need to be refined. LT H further stated, without offering any examples or supporting documentation, that the applicant was left out of command briefs, which hindered his ability to supervise personnel efficiently.

4. However, both the SOER supervisor and reporting officer stated the applicant was included in command briefs. The supervisor stated that she and the applicant had daily briefings with the CO at 0615, 0900, and 1000 during the initial standup of the MSST, as well as afternoon staff meetings with the E-7s. The supervisor further wrote that after the first phase of the MSST standup, she and the CO continued to hold morning briefs and staff meetings that included the applicant. Moreover, she stated that the command published their expectations and standards through emails and a public MSST folder containing the units NAV standards, units organization manual, and the CO’s standing orders. In contrast, the applicant failed to provide the Board with examples of the types of meetings from which he was excluded that, if he had been included, would have caused him to be able to meet the expectations of his rating chain leading to a more favorable evaluation. The statement from LT H, which contains allegations against the CO but very little detail or examples, is insufficient to prove that the CO’s expectations of the applicant were unjust or that the marks and comments in the disputed SOER are inaccurate. Nor was the evidence offered by the applicant sufficient to prove that the rating chain’s expectations and tasks were unclear or that the applicant was wrongfully excluded from any meetings by design of the CO or XO. In weighing the credibility of LT H’s statement, the Board notes that he experienced similar performance problems to those of the applicant: removal from his primary duties and the imposition of NJP.

5. With respect to comments in the SOER about his failure to provide timely updates to the command and his lack of attention to detail, the applicant offered his previous OERs as examples that past rating chains commented favorably about his performance in these areas. However, the Board has consistently held that past and subsequent performance evaluations do not prove that the evaluated performance under review for a specific period is erroneous or unjust. As the advisory opinion states, OERs represent the evaluation of performance for a

³ *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.

⁴ 33 C.F.R. § 52.24(b).

period in time and rating chains do not compare their evaluations of an officer's performance with previously evaluated performance, but rather rate the officer's performance during the evaluation period according to the standards printed on the OER form. Articles 10.A.4.c.2.b. & 10.A.4.c.6.b. of the Personnel Manual state that the reported-on officer's performance shall be compared against the printed standards not to other officers and not to the same officer in a previous reporting period. It would also not be advisable to compare the applicant's performance evaluated in the SOER against his earlier evaluations because his duties evaluated in the SOER were different from those in his earlier OERs. For example, in his earlier assignments he was a staff officer in the law enforcement division, but in the SOER he was head of the operations department⁵ which carried a significant increase in responsibility from earlier assignments. In addition, his earlier duties did not require him to perform supervisory duties, but according to the SOER the applicant was responsible for leading numerous personnel and evaluating their performance. This too was an increase in responsibility from his earlier assignments and could help to explain the decline in his performance from earlier periods.

6. The applicant and LT H state that the CO was a difficult person to approach. However, they provided no examples of when they attempted to approach the CO and on what issues. The applicant made a general allegation that when he approached the CO, he acted as if overwhelmed or responded negatively. However, this is a mere allegation that tells the Board very little about the specific history between the CO and the applicant or why the CO would have such a reaction, if true. Moreover, the CO declared that he had an open door policy. The applicant has failed to prove by a preponderance of the evidence that the SOER comments about the applicant's failure to keep the command informed or his lack of attention to detail are erroneous or unjust.

7. The applicant's allegation and that of LT H that "the CO appeared to have a personality conflict with the applicant" is a mere allegation without any specific detail to give it any credibility. The applicant points to the comment "conveyed poor image of self & command; displayed uncooperative or dissenting gesture w/implementing units objectives during staff & ops mtgs; actions hindered CMD's effectiveness" as proof of the CO's personality conflict with the applicant, because according to the applicant the comment is negative, vague, and unsubstantiated. The XO stated that during staff meetings the applicant showed disapproval of her tasking through is body language, such as by rolling his eyes behind her back, as witnessed by the CO and planning officer. Therefore, the comment has a basis in fact and is not vague. In his reply to the advisory opinion, the applicant suggested that the CO was biased against him due to his ethnicity. However, he provided no corroboration for this allegation. Moreover, the members of the rating chain denied that the CO had a bias against the applicant. In the absence of specific significant evidence to the contrary, the Board finds that holding the applicant accountable for his performance or lack thereof does not establish bias; nor does the evidence of record establish that the CO had a personality conflict with the applicant.

8. The applicant argued that the CO did not empower him to succeed and that the CO had no formula for success. However, the Board notes that the applicant fails to offer evidence

⁵ Article 6-4-1 of the United States Coast Guard Regulations (1992) states that the "operations officer shall be head of the operations department."

that he sought out the CO and/or XO on guidance for improving his performance. The CO and XO stated that they had numerous meetings with the applicant. However, the applicant has failed to indicate the number of times he requested to meet with the XO/CO about his performance and how he could meet the rating chain's expectations. According to the Personnel Manual, the applicant is responsible for managing his performance and for seeking feedback if directions or tasks are not clear. See Article 10.A.1.b. of the Personnel Manual.⁶ Again, he alleged that the CO did not have an open door policy, but he did not provide proof that he was ever denied entrance through that door due to bias or a personality conflict. As the OPS, the applicant should have approached the CO as often as required for clarification of assignments and to provide the necessary updates.

9. The CO readily admitted that he had high writing standards and requirements, but he also stated that they were not impossible to meet. Each CO and/or manager has his or her own way of doing things and management style. It is up to the reported-on officer, in this case the applicant, to make the necessary adjustments in his work product to meet the CO's requirements. Apparently, the applicant was never able to do this. Moreover, the applicant offers no samples of any written work that he submitted to the CO and that were returned to him that would demonstrate the CO's unreasonableness in this area. LT H's statement that evaluation expectations were arduous and involved doing things that went well above Commandant's policy lacks detail and specific examples of how the CO requirements in this regard were so unreasonable that the applicant could never be expected to meet them. Returning written work to a subordinate for revision is not unusual. Communication skills is a legitimate evaluation area on the OER, and the Board will not remove a comment, mark, or the SOER itself based on general allegations blaming the CO for the applicant's failure to meet the expectations of the rating chain.

10. The applicant alleges that the CO and XO did not have the necessary experience to stand up the MSST and that it was their lack of leadership that created a confused environment and took a negative toll on unit morale. The Coast Guard offered that both the CO and XO were fully qualified to carry out the duties and responsibilities of their respective positions. Indeed, the CO described his background in his declaration attached to the advisory opinion as having prior service as the executive officer of an MSST and before that, serving as the assistant operations officer at another MSST. In addition, the CO stated, prior to his assignment as CO, he had served over twenty-one years in the Coast Guard. Moreover, he stated that he had served in other leadership positions in the operational community. The applicant alleges that the CO should have had an operations background. However, he fails to explain how the CO's background as described in the record failed to meet this requirement.

11. In addition, the applicant failed to provide the Board with the regulation that states that the MSST's command cadre should be composed of a CO with an operational background, an XO with a marine safety background, and an operational officer with an operational

⁶ Article 10.A.1.b.2. of the Personnel Manual states, "The 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." The reported-on officer is also responsible for seeking clarification of feedback, if not fully understood. Article 10.A.1.c.5. of the Personnel Manual.

background. He noted that the XO was an Academy graduate with only two tours of duty – two years on a cutter and four years as a marine intelligence officer. The Coast Guard assigned the CO and XO of the MSST and must have found them qualified to do the job. The fact that the applicant believes they were not qualified does not make it so. The Board will not second-guess the Coast Guard’s assignment of officers based on general allegations that they lacked the necessary experience to do the job.

12. Accordingly, the Board finds the evidence insufficient to prove that the CO and XO lacked the necessary experience for their positions. In addition, the Board notes that even if they were as inexperienced as the applicant claims, the question is whether their evaluation of the applicant’s performance in the SOER is inaccurate. In this regard, the applicant has simply failed to prove that he performed better than described in the SOER, that the SOER contains misstatements of hard facts, that there were factors in the rating chain that should not have been there, or that there was a clear and prejudicial violation of the regulation. Nor has he proved that the evaluation of his performance in the SOER constitutes an injustice.

13. In light of the above, the applicant’s request for relief should be denied

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

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

Julia Andrews

Jordan S. Fried

Richard Walter