

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-121

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 April 13, 2007, upon receipt of the application, and subsequently prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 19, 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 an officer evaluation report (OER) for the period from July 1, 2000 to May 14, 2001 (disputed OER), from his record and by replacing it with a report for continuity purposes only. The applicant further requested that he be continued on active duty to compete before the next LCDR selection board.¹

The Disputed OER

The OER covers a period when the applicant was an "AMIO [Alien Migrant Interdiction Officer] Officer & Fisheries Enforcement Program Specialist" and assigned to the Xxxxxx Coast Guard District (Dxx) Office of Law Enforcement (ole).

The evaluated performance on the disputed OER consists of three parts: the supervisor's portion, the reporting officer's portion, and the reviewing officer's portion. Under performance of duties in the supervisor's portion of the OER, the applicant received marks of 3 for using resources, results/effectiveness, and adaptability and marks of 2 in planning and preparedness

¹ The applicant advised the BCMR that he was separated from the Coast Guard in June 2007 and is currently serving in the Coast Guard Reserve.

and professional competence.² In support of the below-average marks in this section of the OER, the supervisor wrote:

Planning skills and foresightedness in anticipation of required deadlines was less than expected for an Officer of this grade. Accomplished required coordination with other units to schedule aircraft patrols. As representative for Dxx, acquired specifics of recurring meetings in order to ensure attendance for self. Maintained adequate attendance in work place and required by supervisor. Demonstration of operations expertise declined during reporting period. Was removed from the Collateral Law Enforcement Duty Officer (LEDO) watch section due to performance difficulties during operational L/E cases/reassigned as assistant to LEDO attempts to take advantage of experience base, with little success. Assistance provided was adequate but task focused under direct supervision of Duty Officer. Had difficulties with time management and often sought task priorities from Supervisor and Reporting Officer. Able to perform routine tasks w/little oversight; such as monthly reports on LMR statistics. Accomplished research as required for these reports in a manner that usually met expectations. Inflexible, much more comfortable with routine and cadence in task accomplishment and production of deliverables. Deadlines missed when projects were complicated by variables such as numerous high priority tasks being simultaneously required or known POC's being out of contact. No improvement after counseling.

In the communication skills section of the OER, 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:

Communications adequate. Soft spoken in official venues. Overcome in discussions with others of similar grade . . . Constantly reminded to take notes to ensure task details were not lost after meetings. Difficulty with formatted media such as record message traffic, often missing required paragraph markings. This required proof reader to take extra care to ensure basic structure was followed before editing content. Often used excessive text from reports previously received through the practice of "cut and paste." Mentoring failed to improve skills.

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

Leadership skills lost in mediocre performance. Removed from LEDO rotation for cause which was officer's only situation that tested leadership method. Incapable of supervising others and was relegated to tasks that did not require any

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.

supervisory skills. Driven by events and often caught unprepared for unexpected situations requiring Supervisors to take charge to ensure task completion - EX: Unable to control critical optemps of District Operational Law Enforcement missions. As a team member for Branch evolutions, was often led by the group dynamics. Did not increase team effectiveness, but instead was truly a follower. Took tasking and completed work as required with appropriate/direct guidance. Workplace environment was good. Officer values diversity of others and exhibits positive interpersonal skills with others. Sensitivity to others was offset by troublesome details though, such as Officer's removal from the watch section, requiring others to carry additional work-load, and personal space being unmanageable, where files and records were kept in a constant condition of disarray which affected productivity. Officer did not evaluate others during reporting period. Self evaluation timely - however was brief and did not capture current performance level.

The reporting officer wrote in block 7. of the OER that he unfortunately and sadly concurred with the marks and comments of the supervisor. He stated that the applicant's performance fell and did not improve during the reporting period, which required his removal from the LEDO watch rotation. He further stated that the applicant's accomplishment of routine staff functions was marginal.

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

Accepted tasking as designated by Supervisors, but did not volunteer for tasks or opportunities to improve performance. After being removed from LEDO rotation, Supervisor counseled officer that the disqualification was not permanent and that just as with previous period of remedial training, qualification could be re-acquired. But officer chose to accept assignment as permanent support officer for LEDO. Accepted tasking from LEDO during high tempo periods, where task saturation of LEDO required administrative assistance. This taking was accomplished, but only under direct supervision. Individual judgment was exemplary. Officer holds self to the high standards of the service and accomplishes duties as classified document control station operator without chain of command concern for security of material. Responsibility for own performance falls short of Command expectation. Task quality and continuous improvement are hallmarks which are not met. Professional presence has withered during reporting period – probably the single largest factor relating to Officer's inability to perform LEDO function, where "taking charge" is requirement of specialty. Officer's health is good through daily PT at work.

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 a “marginal performer; limited potential,” which is the equivalent of mark of 2 on a scale of 1 to a high of 7.

In Block 10, the reporting officer did not recommend the applicant for promotion, operational assignments, or positions of increased responsibility, and instead wrote, “His leadership and professional skills are poor.”

The reviewer authenticated the OER without comment. According to the military record, the applicant did not submit a reply to the disputed OER.

Applicant’s Other OERs

The applicant’s LTJG OERs from April 1, 1997, until the commencement date of the disputed OER were average to above average. He received seven regular LTJG OERs and one concurrent OER prior to receipt of the disputed OER. On his first two LTJG OERs, his major duty was described as deck watch officer and on the remaining LTJG OERs, his major duty was described as LEDO (Law Enforcement Duty Officer), in addition to AMIO and Fisheries Enforcement Program Specialist. His LTJG OERs contained occasional marks of 3 and 5, with the majority of his marks being 4s. Beginning with his third LTJG OER the applicant did not receive any marks lower than 4, until receipt of the disputed OER (which is a LT OER).

On the concurrent OER in which he was assigned to duty as a Chinese interpreter for an investigation in Guam, the majority of his marks were 4s, with several 5s and two 6s. On the comparison scale of the concurrent OER he was marked in the fifth spot which described him as “one of the many competent professionals who form the majority of this grade.”

The disputed OER was the applicant’s first in the rank of LT and block 2. of the OER described his major duties as AMIO Officer & Fisheries Enforcement Program Specialist. He received his second LT OER at a new command with a new rating chain where his major duty was Alien Migrant Interdiction Specialist. In the next three LT OERs, the applicant’s major duty was described as Planning and Assessment Officer. On the last LT OER in his record, his major duty was described as DeepWater Human Resource Metrics & Aviation Workforce Transition Officer. Except for the disputed OER, the applicant did not receive any mark lower than 4 on his LT OERs. The vast majority of his marks were 5s, with several marks of 6 and occasional marks of 4. On the comparison scale in block 9, the applicant was marked consistently in the middle block (the fourth spot out of seven) as a “good performer; give tough, challenging assignments.”

APPLICANT’S ALLEGATIONS

The applicant alleged that his raters failed to follow the Commandant’s Diversity Policy resulting in erroneous comments and marks in the disputed OER.

The applicant stated that he is among a handful of Coast Guard officers who have Chinese backgrounds. He was born in Hong Kong and immigrated to the United States at approximately one year of age. Chinese, rather than English, was spoken in his home. In 1991, he became a naturalized citizen. He went to American schools, but on weekends he went to

Saturday school to learn the Chinese and cultural teachings of his parents. The applicant stated that because of his exposure to the American and Chinese cultures, his personality and view of the world are not the same as that of an Americans of European descent.

The applicant cited portions from “Ara Norenzayan, Incheol Choi, & Kaiping Peng, *Perception and Cognition*, HANDBOOK OF CULTURAL PSYCHOLOGY, New York: Guilford Press (forthcoming April 2007)” in support the following conclusions about the impact of Chinese culture on the applicant’s personality and his views:

- That an individual’s cultural context shapes his or her view of the world, and that as a result of his upbringing, the applicant likely has an entirely different thought process from that of most other Coast Guard officers.
- That growing up in a Cantonese-speaking household shaped the applicant’s perception differently from an individual growing up in an English-speaking home.
- That the applicant’s traditional Chinese upbringing taught him to be humble, not to speak up until he is asked a question, and not to interrupt an individual who is speaking. It was ingrained in the applicant to wait for someone to ask his opinion before speaking. These teachings are recognized as greatly affecting an individual’s social interactions.
- That the applicant’s East Asian upbringing affects how he views the world around him.
- That having the applicant reflect the behaviors of another officer who was raised with American culture and tradition would require him to make a complex behavioral change.

The applicant argued that his cultural background should have been considered when his performance was evaluated for the disputed OER because Respect is a Coast Guard Core Value. He quoted the following about Respect from the Coast Guard Core Values statement: “We value our diverse work force. We treat each other with fairness, dignity, and compassion. We encourage individual opportunity and growth. We encourage creativity through empowerment. We work as a team.”³

³ The other two Coast Guard Core Values are:

Honor

Integrity is our standard. We demonstrate uncompromising ethical conduct and moral behavior in all of our personal actions. We are loyal and accountable to the public trust.

* * *

Devotion to Duty

We are professionals, military and civilian, who seek responsibility, accept accountability, and are committed to the successful achievement of our organizational goals. We exist to serve. We serve with pride.

The applicant further argued that the Commandant's diversity policy is driven by the principles of diversity management and valuing differences.⁴ The applicant stated that diversity of management is strategically driven, viewing behaviors and policies as "contributing to organizational goals and objectives." He cited "Difference between Affirmative Action, Diversity, and Diversity Management, available at <http://www.uscg.mil/hq/g-w/Diversity/diff.htm> (last accessed 29 March 2007)." The applicant stated that diversity management is a pragmatic process that benefits the organization by increasing morale, profits, and productivity.

The applicant stated that valuing differences, or diversity, is the uniqueness of all individuals and that it is a qualitative approach placing emphasis "on appreciating differences and creating an environment in which every one feels valued and accepted." *Id.* The applicant quoted the following:

Progress is monitored by organization surveys focused on attitudes and perceptions. Moral and ethical imperatives drive this culture change. Everyone benefits because each person feels valued and accepted in an inclusive environment. [The diversity] [m]odel assumes groups will retain their own characteristics and shape the organization as well as be shaped by it, creating a common set of values. [Id.]

The applicant argued that he was expected to fit an undiversified model of officership. In support of this argument, the applicant pointed to the following comments in the disputed OER which, he alleged show that his background and culture were not considered when his abilities or contributions to the mission were evaluated.

As a team member for Branch evolutions, was often lead by the group dynamics. Did not increase team effectiveness, but instead was truly a follower. [Comment block 5. of disputed OER].

Professional presence has withered during reporting period – probably the single largest factor relating to Officer's inability to perform LEDO function, where

⁴ The Commandant's diversity policy provides:

Diversity is not a program or policy – it is a state of being. Diversity sparks innovation and incorporates fresh approaches. It provides well-rounded perspectives in problem solving that let us identify better ways of performing the duties entrusted to us by our government and fellow citizens.

The Coast Guard is a diverse works force. Our mission success and our core values require us to ensure our work environment enhances the potential and contribution of all employees by promoting inclusion, equity, and respect.

* * *

I am personally committed to ensuring our Coast Guard provides an environment that values and embraces the contributions and potential of every member of our diverse workforce. Our Core values of Honor, Respect, and Devotion to Duty are fundamental to our individual and collective success. Live them every day.

“taking charge” is a requirement of specialty. [Comment block 8. of disputed OER].

The applicant stated that in 2004 the Coast Guard’s minority representation was the lowest of all the armed services, falling well below the percentage of minorities in the U.S. population. See “Coast Guard Civil Rights Directorate, *2004 Demographics & Civil Rights Program Report* at iv.” According to the applicant, the U.S. Census Bureau statistics for 2000 show that Asians comprised 3.8% of the population, but within the Coast Guard, Asians comprise only 2.5% of the active duty force, a significant under representation. The applicant further argued:

Diversity comes in all shapes and sizes. If the expectation is for Officers to reflect Anglo Characteristics, the Coast Guard will never comport with the Commandant’s Diversity Policy. [The applicant] is a much-needed asset for the Coast Guard. His Cantonese and Mandarin language abilities directly contribute to the Coast Guard mission. A combination of the under representation of the Asian population in the Coast Guard and [the applicant’s] language proficiencies magnify his value.

[The applicant’s] raters and the Coast Guard failed to adhere to the principles of diversity and the Commandant’s Diversity Policy. His background and skills contribute to the Coast Guard mission. Unfortunately, the rating chain evaluated him with a “cookie cutter” mindset. He was unfairly compared with stereotypical ideals rather than evaluating his actual contribution to the Coast Guard. The resulting subjective evaluation resulted in erroneous comments and marks in his OER that violated [Article 10.A.1.b. of the Personnel Manual] and the Commandant’s Diversity Policy. The disputed OER should be removed and a continuity report substituted for it.

The applicant’s attorney submitted a declaration under penalty of perjury from the applicant who stated that he entered the Coast Guard through the Minority Officer Recruiting Effort that required him to enlist in the Coast Guard, graduate from college and then go on to Officer Candidate School. In 1995, he graduated from college, after which he completed OCS and was commissioned an ensign in the Coast Guard.

As a youth, the applicant stated that he went to Saturday school to learn about Chinese culture, tradition, and language. He stated that his studies taught him to be humble and stressed that in the Chinese culture, “you do not speak up until you are asked a question.” Nor do you interrupt a person speaking. He stated that it was ingrained in him to wait for people to ask his opinion, and he thinks that he may have missed opportunities to weigh in on issues as a result.

My evaluations at District xx were good. I feel that I performed in the same manner, if not better during the 1 July 2000 to the 14 May 2001 rating period. I was told to be more assertive during my performance feedback. My supervisor also wanted me to be “larger than life” and more like another individual in the office. I got the feeling that I was expected to exhibit certain personality traits. I

tried to adjust and portray what I felt they were looking for. Unfortunately, I could not change years of learned behavior overnight.

At 5' 5" tall and 120 pounds, I am usually one of the smallest people in the room. I do not think my physical build is what my supervisor was referring to when he said that I needed to be larger than life. The 1 July 2000 to the 14 May 2001 rating period perplexes me. I was rated well for the previous period. Following this rating period, I transferred to Hawaii where I did essentially the same job. I was once again rated well for that period. I do not think my performance changed.

VIEWS OF THE COAST GUARD

On August 23, 2007, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. He further adopted the facts and analysis provided by Commander Coast Guard Personnel Command (CGPC) and asked the Board to accept them as the Coast Guard's advisory opinion.

CGPC stated that based on the record, the rating chain carried out its duties in accordance with Chapter 10 of the Personnel Manual. CGPC further stated that the rating chain was not required to consider and incorporate the applicant's cultural background into the disputed OER. CGPC stated there is no evidence of discrimination on the part of the rating chain. He stated that although the Coast Guard promotes a diverse workforce and respects individual differences, officers are still required to perform based on established standards described in the Officer Evaluation Report that apply to all equally.

The Coast Guard obtained declarations under penalty of perjury from the supervisor, reporting officer, and reviewer.

1. The supervisor stated that the applicant's culture and background were never considered by me in his duty assignment or performance measurement. The supervisor stated that during the period in question, he contacted the Pacific Area Equal Employment Opportunity office for information about the Commandant's Policies on Diversity and he was told that background, culture, race and ethnicity were not considerations for duty assignment or performance measurement. With respect to the applicant's performance during the period covered by the disputed OER, the supervisor stated the following:

[H]is performance level was surpassed by the scope and tempo of his duties. As recorded in [the applicant's] evaluation record, he had been fully trained and was meeting the standards required for one of Dxx's cadre of LEDO's of which I was a member. But, during his 2001/05/14 evaluation period, [the applicant] was unable to meet the increased operational tempo of Law Enforcement cases to which he and his colleagues were prosecuting. Initially, on direction of the Branch Chief, he was removed from the duty rotation and placed in remedial training. After remedial training did not improve performance, his duties were tailored and the position of Assistant LEDO was created for him affording him an

opportunity to improve his performance and take advantage of his long earned skills in Law Enforcement prosecution. [The applicant] was advised by me, this position would be temporary, until he felt that he could be considered for reinstatement as LEDO. Due to the nature and design of the Dxx staff, the Command was unable to reassign [the applicant] to another position that more suited his personal strengths.

2. The reporting officer declared that the disputed OER was based on the applicant's performance as measured against the OER standards expected of all Coast Guard officers of his grade, regardless of heritage or culture. The reporting officer stated that during the evaluation period, he had daily contact with the applicant and directly observed his performance. The reporting officer stated, "[The applicant] is a fine, decent, and likeable individual. However his OER for the period in question accurately reflects his performance as a USCG officer and as a member of the Dxx staff."

3. The reviewer declared that the disputed OER is an accurate reflection of the applicant's performance and should not be removed from his record. The reviewer argued that we must assume that the applicant accepted that the comments and marks are a proper reflection of his performance because he did not allege that the narrative comments are incorrect, that the marks do not properly reflect the narrative comments, or that there were acts of discrimination. The reviewer further stated:

The request to have this OER removed . . . is a dissertation on the cultural differences between Europeans and Asians, statistics about recruiting and retention of Asians in the Coast Guard, and a collection of OERS that are not a reflection of this officer's performance during the period of the OER that is being disputed. Without any concrete allegations of impropriety by this officer's rating chain, I can not provide a more detailed response . . .

This officer's rating chain did not use a "cookie cutter" mindset as the basis for evaluation or unfairly use stereotypical ideals rather than this officer's actual contribution to the Coast Guard. The rating chain observed the Coast Guard's core values of "Honor, Respect and Devotion to Duty," valued diversity in the workforce, treated this officer fairly and accurately reflect his officer's performance in the OER.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 11, 2007, the Board received the applicant's reply to the views of the Coast Guard. He stated that each person in his rating chain stated that diversity is not considered in the evaluation process and that none of the raters considered his cultural background.

The applicant argued that his situation is especially troublesome because the Coast Guard commissioned him through a Minority Recruiting effort. Thus the initial effort on the part of the Coast Guard to create a diverse workforce was frustrated by the application of a stereotypical model to his evaluation. The applicant stated that as a result, he received an OER with erroneous

marks and comments that caused him to not be selected for promotion and to be separated from the Coast Guard.

The applicant submitted another declaration under penalty of perjury that allegedly shows some of the comments and marks on the disputed OER were unsupported. The applicant declared that he did not submit a request to the Personnel Records Review Board (PRRB) within 12 months of receipt of the OER because his supervisor counseled him that the OER would not be considered by the LCDR promotion and therefore would not adversely affect his chances for promotion. He further alleged that his supervisor told him that the disputed OER would “not be considered” if [his] subsequent performance improved. The applicant also claimed that he was afraid that his supervisor would stop his transfer to Dxx Office of Law Enforcement if he objected to the OER.

The applicant stated that he did not receive any “remedial training” as claimed by his supervisor. He stated that he was already a qualified LEDO prior to the disputed reporting period. He stated for the last five months covered by the disputed OER, he was assigned menial tasks while opportunities to prove his abilities were withheld. He stated that although he was assigned to be “Assistant LEDO,” his peer LEDOs declined assistance from him and that he was never given the opportunity to run cases so that he could be reinstated as LEDO.

Additionally, the applicant stated that the disputed OER is not an accurate reflection of his performance for the following reasons:

“a. From 2000/07/01 to 2000/12/18 (the first half of the disputed marking period), I was in the LEDO watch stander rotation and ran numerous Counter Drug (CD) and Alien Migrant Interdiction Operations (AIMO) law enforcement cases to successful completion.

“b. I submitted supporting documentation for all the cases I completed before the disputed OER was prepared. However, not one single case I performed as a qualified LEDO during this period is mentioned in the OER.

“c. The last case I completed as LEDO was on 2000/12/18 (xxxxxxxxxxxxxxxxxxxxxxxxxxxx). It resulted in the seizure of xxx lbs of cocaine and seven crew members being apprehended.

“d. I was subpoenaed by the US District Court Middle District of xxxxxxxxxxxxxxxxxxxx, to testify in a criminal case against xxxxxxxxxxxxxxxxxxxx, et al. on 2001/03/30 and 2001/04.02. As a result of my testimony and that of the members of LEDET 104, all Go-Fast crewmembers pleaded guilty and received 70 to 159 months of incarceration.

“e. Unlike my previous Dxx OERs, the comments section of the disputed OER contains circular reasoning, vague and basically regurgitated descriptors for each performance dimension, and lacks specific examples to justify the marks. For example for block 3.a. “planning and Preparedness,” there is a comment stating, “Planning skills and foresightedness in anticipation of required deadlines less than expected for an officer of this grade.” The next comment, “Accomplished required coordination with other units to schedule aircraft patrols, directly contradicts that previous comment. These vague general statements, like most of the other

comments, are not substantiated by specific examples because there are no reports or records upon which they can be based. The comments and resulting marks are purely subjective.”

FINDINGS AND CONCLUSIONS

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

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

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.⁵ For the reasons discussed below, the Board finds the applicant has failed to meet his burden of proof.

4. The applicant has failed to prove by preponderance of the evidence that the rating chain for the disputed OER committed an error or injustice by not making the applicant's Chinese heritage and culture a factor in evaluating the applicant's performance for the period covered by the disputed OER. Nor has he shown by a preponderance of the evidence that the members of the applicant's rating chain for the disputed OER violated the Commandant's Policy on Diversity or the Coast Guard's Core Values by commenting that the applicant was a follower rather than a leader, that he failed to take charge, or that his professional presence withered, etc. The applicant explained that his lack of assertiveness was actually an attribute of his Chinese culture that teaches humbleness, and that, under the Coast Guard Core Value of Respect, his cultural background should have been considered when his performance was evaluated for the disputed OER. The Coast Guard Core Values of Honor, Respect, and Devotion to Duty as well as the Commandant's diversity policy are intended to ensure that all members of the Coast Guard have fair and equal access to assignments, promotions, etc. However, there is nothing in these policies which state that the rating chain should consider a reported-on officer's ethnic, racial, religious, or gender diversity in evaluating that officer's performance. To do so would create different evaluation criteria among Coast Guard officers that could result in unfair and unequal treatment in the evaluation process. In addition, the applicant has submitted no evidence that any other officer of his grade has received such consideration in evaluating his or her performance.

5. The applicant's argument that he was expected to fit an undiversified model of officership is without merit. As required by the Personnel Manual, the applicant was measured against the standards on the OER form like any other officer. Moreover, he has not persuaded the Board that Chinese officers serving in the Coast Guard are because of their culture,

⁵ 33 C.F.R. § 52.24(b).

inherently unable to take charge or provide strong leadership. For the Board to reach such a conclusion would be an insult to those Chinese American officers who have succeeded in the Coast Guard. The comments singled out by the applicant in this regard “was often led by the group dynamics. Did not increase team effectiveness, but instead was truly a follower and Professional presence has withered . . . probably the single largest factor relating to Officer’s inability to perform LEDO function, where ‘taking charge’ is a requirement of specialty” could describe any officer who failed to display adequate leadership.

6. Moreover, there is no provision in Article 10.A. (Officer Evaluation System) of the Personnel Manual that requires that a rating chain consider the ethnicity, heritage, or culture of a reported-on officer in their evaluations of that officer’s performance. To do so would create a different or favored standard of performance for some officers, but not for others. In fact, Article 10.A.1.a. states that the Coast Guard Officer Evaluation System has been designed to set performance and character standards to evaluate each officer; prescribe organizational values by which each Coast Guard officer can be described; and provide a means of feed back to determine how well an officer is measuring up to the standards. Further, Article 10.A.1.b. states that the 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 job and task performed by officers. In using the Officer Evaluation Form . . . strict and conscientious adherence to specific wording of the standards is essential to realizing the purpose of the evaluation system.” The Commandant has determined that each officer is to be measured against prewritten standards on the OER form for each dimension, and the regulation makes no mention that an officer’s failure to meet a certain level of performance is to be excused because of his or her race, ethnicity, culture, or heritage. The applicant was apparently expected to comply with the same set of evaluation criteria as any other officer of his grade and job, and he has not proved that the performance standards should have been tailored to fit his personality.

7. In his reply to the advisory opinion, the applicant alleged that the OER is not an accurate assessment of his performance for the following reasons:

a. Applicant’s comment: “From 2000/07/01 to 2000/12/18 (the first half of the disputed marking period), I was in the LEDO watch stander rotation and ran numerous Counter Drug (CD) and Alien Migrant Interdiction Operations (AIMO) law enforcement cases to successful completion.” However, the supervisor’s comments in block 3. contradict the applicant on this point. The supervisor stated that the applicant’s “[d]emonstration of operations expertise declined during reporting period. Was removed from the Collateral Law Enforcement Duty Officer (LEDO) watch section due to performance difficulties during operational L/E cases/reassigned as assistant to LEDO attempts to take advantage of experience base, with little success.” The supervisor’s comments indicate that the applicant’s performance led to his removal from the LEDO rotation. The applicant has not submitted any evidence to corroborate his contention.

b. Applicant’s comment: “I submitted supporting documentation for all the cases I completed before the disputed OER was prepared. However, not one single case I performed as a qualified LEDO during this period is mentioned in the OER.” Again, the applicant did not

submit to the Board any evidence of cases that he completed during the reporting cycle under review. The Board notes the supervisor's comment in leadership skills portion of the OER that "[The applicant's] self evaluation timely – however was brief and did not capture current performance level." Therefore, even if the applicant did mention the alleged accomplishment in his OER input, the fact that it is not mentioned in the OER does not make the OER invalid or erroneous. It could have been that in the judgment of the reporting chain, the applicant's input did not accurately describe his participation in those cases or that his participation was not worthy of mention.

c. Applicant's comment: "The last case I completed as LEDO was on 2000/12/18 (xx). It resulted in the seizure of xxx lbs of cocaine and seven crew members being apprehended." The applicant presented no corroboration that he completed such a case during the reporting period under review. The case could have been completed in an earlier reporting period. It is hard to believe that a member of the rating chain would not have mentioned such an accomplishment in the disputed OER if it actually occurred during the reporting period. The applicant has not proven that such an accomplishment occurred during the reporting period and that it was omitted erroneously from the disputed OER.

d. Applicant's comment: "I was subpoenaed by the US District Court Middle District of xxxxxxxxxxxxxxxxxxxx, to testify in a criminal case against xxxxxxxxxxxxxxxxxxxx, et al. on 2001/03/30 and 2001/04.02. As a result of my testimony and that of the members of LEDET 104, all Go-Fast crewmembers pleaded guilty and received 70 to 159 months of incarceration." Again, the applicant submitted no corroboration for this alleged accomplishment or that it occurred during the reporting period under review. Therefore, he has failed to prove that the OER is inaccurate because it does not include this alleged accomplishment.

e. Applicant's comment: "Unlike my previous Dxx OERs, the comments section of the disputed OER contains circular reasoning, vague and basically regurgitated descriptors for each performance dimension, and lacks specific examples to justify the marks. For example for block 3.a. 'planning and Preparedness,' there is a comment stating, 'Planning skills and foresightedness in anticipation of required deadlines less than expected for an officer of this grade.' The next comment, 'Accomplished required coordination with other units to schedule aircraft patrols,' directly contradicts that previous comment. The comments and resulting marks are purely subjective.'" However, the Board having reviewed the entire OER finds that it clearly explains the applicant's shortcomings as well as his moderate successes. The applicant has the burden of proving that the disputed OER is an inaccurate assessment of his performance and he has failed to do so.

8. The Article "Perception and Cognition" offered by the applicant explains the impact that one's culture can have on his or her personality. But it does not prove that the evaluation of the applicant's performance for the period under review was erroneous. It is clear from the disputed OER that the applicant had a decline in his performance from the previous and subsequent periods, but that fact alone does not make the OER inaccurate. The Board notes that the applicant did not make a claim of entitlement to cultural consideration in prior and subsequent average to above average OERs. The Board is not persuaded that the applicant believes that his average to above average performance in his other OERs was the result of a

lowered standard due to his Chinese heritage and culture, rather than the result of his hard work and demonstrated performance.

9. Further, the applicant argued that the under-representation of Asians in the Coast Guard and his proficient Chinese language skills made him a much needed asset to the Coast Guard and its mission. The fact that the number of Asians officers in the Coast Guard may not reflect the percentage of Asians within the United States population, does not prove that the applicant performed any better than described in the disputed evaluation. In addition, while his language proficiency has at times been of value to the completion of the Coast Guard mission, that skill cannot be used to cover shortcomings in the performance of his assigned duties for the period under review. Nor has the applicant proven that his height or weight were factors in the evaluation of his performance. As stated above, the evaluation of the applicant's performance is measured against predetermined standards on the OER form.

10. The applicant appears to suggest that because he was recruited under the Coast Guard's Minority Recruiting Effort there was a duty to consider his Chinese heritage when evaluating his performance. The fact that the Coast Guard has an effort in place to help insure minority officer prospects have fair and equal access to recruiting opportunities does not mean that such officers once in the Coast Guard should be evaluated differently than other officers. The Board notes that individuals who lack strong leadership and assertiveness skills exist in all groups. So, if the applicant's poor leadership skills are excused because of his Chinese heritage and culture, the Coast Guard would be required to extend that same consideration to other groups.

11. The applicant has failed to prove that his supervisor told him that the disputed OER would not be considered by the LCDR selection board and that "it would not be considered" if his performance subsequently improved. There is no corroboration by the applicant for this allegation. Besides, the Personnel Manual governs the processing of OERs. The Board is aware of no provision that allows for the withholding of a properly validated OER from a selection board, unless it is removed from an officer's military record through an avenue (BCMR) listed in Chapter 10. Withholding or removing an OER by a member of the rating chain is not listed as an avenue for removing an OER from a record. Additionally, the applicant denied that he received "remedial training" as described by the supervisor. However, the reporting officer corroborates the supervisor in this regard by the following statement in the OER "After being removed from LEDO rotation, supervisor counseled officer that the disqualification was not permanent and that just as with previous period of remedial training qualification could be re-acquired."

12. The applicant has failed to prove an error or injustice with respect to the disputed OER. With no error or injustice having been established, there is no basis on which to consider the applicant's request for continuation on active duty or the removal of his failures of selection for promotion to LCDR.

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

ORDER

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

Steven J. Pecinovsky

J. Carter Robertson

Richard Walter