

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2007-146

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 June 20, 2007, upon receipt of the completed application, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 27, 2008, 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, a retired Reserve officer, asked the Board to correct his officer evaluation report (OER) for the period June 1, 2002, to April 30, 2004, by

- raising the low marks of 3 that he was assigned in the performance categories “Workplace Climate,” “Evaluations,” and “Judgment” to marks of 4 or higher;¹
- removing the following sentences from block 5, which support the low marks for “Workplace Climate” and “Evaluations”: “However, some episodes of unwelcome behavior contributed to poor office climate, e.g., unsolicited negative remarks interrupted counseling session between E-3 and O-4 in adjacent office cubicle, sensitive email sent unit wide, and inappropriate assumption of tasking authority w/ a senior O-3 in Dept. OSF poorly documented, w/ vague or no results recorded, even though 4 IDT drills were used to prepare OER package”;
- removing the following sentences from block 8, which support the low mark for “Judgment”: “Sent argumentative emails to Dept. Head and XO, producing extra admin. work where mbr should have taken initiative to research; e.g., dispute over policy regarding use of health records by CG. Inappropriate use of CG Workstation III for ‘data streaming’ acknowledged and practice ended”;

¹ Coast Guard officers are rated in numerous categories of performance on a scale of 1 to 7, with 7 being best. A middle mark of 4 is the “expected standard of performance.” Personnel Manual, Art. 10.A.4.c.4.g.

- raising his mark on the comparison scale in the disputed OER from the third spot to the fourth or fifth spot;² and
- removing the sentence, “At times, requires more task direction than should be necessary for an O-4,” from block 10.

The applicant stated that the negative comments in block 5 that support the mark of 3 for “Workplace Climate” are erroneous and unfair. He alleged that the comment about “unwelcome behavior” was based on hearsay and that no one ever asked him about the alleged incidents. He was never counseled about any unwelcome behavior and the term is too vague for him to refute. Regarding the “interrupted counseling session,” the applicant argued that if his behavior was noteworthy enough to be mentioned in his OER, his Supervisor should have asked him about it to get his side of the story. He argued that the comment should be deleted because there is no corroborating evidence to support it. He alleged that the comment about having inappropriately tasked an O-3 “was never substantiated despite my specific request for an example of it.” He alleged that he asked the Supervisor during a counseling session for an example of such tasking, and his Supervisor replied, “This is NOT a question and answer session.” Therefore, the applicant argued, the comment should be removed because his Supervisor refused to clarify the comment, contrary to Article 10.A.1.c.5. of the Personnel Manual.

The applicant stated that comments about his OSF, which support the mark of 3 for “Evaluations,” are inaccurate since he submitted an in-depth OSF (officer support form) on March 7, 2004, and did not receive a request for more information or clarification until May 9, 2004.

The applicant stated that the comments in block 8 about his emails are false and unfair. He alleged that the emails at issue concerned a release form that violated the privacy rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and that an officer at Headquarters “has stipulated that the form violated HIPAA standards.” Moreover, he argued that he did research the issue extensively and his emails were not argumentative in tenor. In addition, he argued that the negative comments must be deleted because the emails in question were sent outside of the evaluation period for the disputed OER, which is a violation of Article 10.A.4.f.11. of the Personnel Manual. He noted that his OER Reply includes other substantial objections to the comment in block 8.

Regarding the negative comment in block 8, the applicant stated that, as indicated in his OER Reply, “there routinely was no tasking, guidance, input or any direction provided by the Department Head or his designee(s). Any tasking (normally in the form of an email) was nebulous and/or non-specific. [The Supervisor] was seldom, if ever, present on drill weekends to provide face-to-face communications and guidance.” He noted that in response to one of his requests for guidance in October 2004, he was told that there was nothing for the reservists to do that weekend. He alleged that this response was “representative of the overall lack of guidance

² The comparison scale on an OER is not actually numbered but there are seven possible marks. A mark in the third spot means that in comparison with all the other officers of the same rank/grade whom the reporting officer has ever known, the applicant was deemed to be a “[f]air performer; recommended for increased responsibility.” A mark in the fourth spot would mean that he was deemed to be a “[g]ood performer; give tough, challenging assignments,” and a mark in the fifth spot would mean that he was deemed to be an “[e]xcellent performer; give toughest, most challenging leadership assignments.”

and tasking present in the Planning Department for myself and other reservists assigned to the Planning Department.”

The applicant pointed to his prior, superior OERs from the same unit as evidence that the disputed OER is erroneous and unfair. He alleged that low marks and negative comments in the OER are the result of his informing his Supervisor and unit Executive Officer (XO) that “the medical release form that they were trying to get all reservists to sign to access their civilian medical records violated HIPAA.”

In support of his allegations, the applicant submitted a copy of a letter dated October 25, 2006, from the Coast Guard to a congressman in response to his inquiry on the applicant’s behalf. In this letter, the Coast Guard admitted that the medical release form to which the applicant had objected was not in compliance with HIPAA but stated that it had been revised so that a HIPAA-compliant form was now in use. In addition, the applicant submitted a series of email messages dated June 10 and 11, 2004. In his first email, the applicant advised the Supervisor that the medical release form the unit command had distributed was illegal because it was “blanket and non-specific” but that he would be happy to sign a form to release his civilian medical records as long as the form showed the limited scope or purpose of the release. The Supervisor replied that the Medical Manual indicated that the release form was proper and advised him to ensure that the unit’s health technician could get his civilian medical records. The applicant further responded that he would get in touch with the health technician and that “[j]ust for clarity’s sake, while the Coast Guard does need current medical information on its members, 42 CFR (and HIPAA) does not give the Coast Guard the right to blanket access to any member’s medical information. ... Additionally, HIPAA’s ‘minimum necessary’ provision precludes any agency or organization from having blanket access to an individual’s medical record without specificity, scope, business need, and express expiration of consent dates. ...” In response, the unit XO wrote to the applicant in an email that the Coast Guard needed to ensure that he was “fit for full duty and deployment as a part of the CG reserves. I’m not a lawyer, but to me that is sufficient specificity The law is designed to prevent unauthorized disclosure and abuse—not to allow military members to circumvent their responsibilities. Let’s be reasonable about the intent of the law and a member’s duty. If you feel compelled to withhold medical information based on your understanding of HIPAA, feel free to exercise your right. Failure to keep your medical record up to date as specified by CG regulations will be dealt with administratively. ... I hope this clears up this issue.” The applicant replied to the unit XO, saying that he fully supported disclosure of medical information and did not support withholding such information and that his only objection was to the form itself because blanket medical release forms are illegal under 42 CFR and HIPAA. He stated that the form should be HIPAA compliant.

The applicant also submitted another series of emails dated October 18, 2004, in which an officer noted that the applicant had signed up to drill twice a month instead of once a month in November, which was not necessary unless the applicant was working on a special project. In response, the applicant offered to work on anything that needed doing because he “wanted to get in some additional drills before I retire, so please let me know what project or tasks you need help with and I will work on them on my remaining weekends.” The officer replied that the applicant should only drill on his one regular weekend because “we don’t really have anything for you to do. I would prefer to have you here the same day as [another reservist] on November 13-14 so we can coordinate some work for both of you.”

The applicant also submitted a copy of his input for the disputed OER. For each weekend that he drilled, the applicant provided a list of up to fifteen tasks that he had accomplished. For example, for the weekend of November 9 and 10, 2002, the applicant summarized his work as follows:

1. Assumed and fulfilled various duties and obligations of Reserve Duty Coordinator
2. Waded through 83 emails, most of which were appropriate for auto-expire, given the events had already passed.
3. Briefed new, incoming officer, [LCDR C] about the NVIC 9-02 project and strategy for working on same.
4. Scanned in NVIC 9-02 utilizing the sheet-feeder scanner in Planning. Saved it in MS Word format.
5. Corrected scanning errors from the scanning process.
6. Recreated NVIC 9-02 tables in Excel and pasted them into the MS Word document.
7. Attempted to update POISE website links—was successful. My access has been restored.
8. Entered next month's drilling dates into CGHRMS. The system was up during the weekend.
9. Created directories on the "W" drive for the NVIC. Created folders under a folder called Plans, called North Coast, South Coast, Lower Columbia, and Upper Columbia.
10. Administered the re-enlisted oath to [PO L]. Signed necessary paperwork.
11. Followed-up with [YNC B] regarding [PO B's] on-going pay problems.
12. Counseled [PO W] regarding advancement issues and two overpayment issues.

Beside many of the numbered items, the applicant wrote in a notation of a performance category on the OER form, indicating that he felt that his performance of the task supported a good mark in the noted performance category. For instance, he wrote "3E" beside numbers 4, 5, and 10 in the list above, which indicates that he thought those tasks were examples of his efforts in the performance category "Professional Competence." He also wrote "3D" for "Adaptability" beside number 6; "5C" for "Directing Others" beside number 11; and "4A" for "Speaking and Listening" beside number 12.

SUMMARY OF THE APPLICANT'S RECORD

On June 27, 1977, the applicant enlisted in the regular Coast Guard. He was discharged from active duty on August 24, 1984, but immediately joined the Selected Reserve, where he regularly drilled and performed annual training.

On August 9, 1991, the applicant was appointed an ensign in the Reserve. He continued to drill and perform annual training regularly. He served as a Group duty officer and was promoted to lieutenant junior grade on February 16, 1992, and to lieutenant on February 16, 1996. He consistently received marks of 4 and 5 on his OERs. In August 1997, he completed twenty satisfactory years of service toward a Reserve retirement.

As a lieutenant, the applicant first worked as an operations readiness planner, receiving primarily marks of 5 on his OERs. From 1998 through 2001, he worked as an assistant surface operations officer and received primarily high marks of 6 on his OERs. From May 2001 to May 2002, he worked as a waterways analysis management officer and received very good marks of 5 on his OER for this work. He was promoted to lieutenant commander in the Reserve on August 1, 2002.

The disputed OER covers the applicant's service from June 1, 2002, through April 30, 2004, as a contingency preparedness and planning officer. The OER indicates that the position required him to "[c]reate, implement, and maintain disaster preparedness plans & unit emergency response plans; develop unit policy on SELRES management; [and] maintain readiness for mobilization deployment." In addition, as the Group's Reserve duty coordinator, he researched and developed hardware, software, and database applications to support unit missions.

On the disputed OER, the Supervisor, who was an active duty lieutenant commander serving as chief of the Planning Department, assigned the applicant average marks of 4 for "Planning and Preparedness," "Using Resources," "Results/Effectiveness," "Adaptability," "Professional Competence," "Speaking and Listening," "Writing," "Looking Out for Others," "Developing Others," "Directing Others," and "Teamwork," and included supporting positive, though not highly laudatory, comments, for these average marks. However, he assigned the applicant low marks of 3 in the categories "Workplace Climate" and "Evaluations" and supported these marks with the following comments:

Generally pleasant demeanor usually encouraged open dialogue. However, some episodes of unwelcome behavior contributed to poor office climate, e.g., unsolicited negative remarks interrupted counseling session between E-3 and O-4 in adjacent office cubicle, sensitive email sent unit wide, and inappropriate assumption of tasking authority w/ a senior O-3 in Dept. OSF poorly documented, w/ vague or no results recorded, even though 4 IDT drills were used to prepare OER package.

The Reporting Officer, who was the Deputy Group Commander, assigned the applicant marks of 4 for "Initiative," "Responsibility," "Professional Presence," and "Health and Well-Being," but a low mark of 3 for "Judgment," with the following comments:

When first assigned to Planning, took initiative & met with the Dept. Head to outline duties, responsibility & expectations. Some original contributions to Dept., dependably brings attention to shortfalls in SWIII email policy or promptness of SELRES pay. Some progress evident in obtaining Marine Safety Insignia quals., e.g., attending CPPX school. Sent argumentative emails to Dept. Head and XO, producing extra admin. work where mbr should have taken initiative to research; e.g., dispute over policy regarding use of health records by CG. Inappropriate use of CG Workstation III for "data streaming" acknowledged and practice ended. ...

The Reporting Officer also assigned the applicant a mark of 3 on the comparison scale, denoting a "[f]air performer; recommended for increased responsibility." Regarding the applicant's leadership potential, the Reporting Officer commented that he

brings value to the CG through his IT skills and knowledge of computer systems administration. Assignment to an IT unit may maximize his technical potential. Capable of employing skills gained at CPPX school to a greater extent in Planning Dept. At times, requires more task direction than should be necessary for an O-4. While he has shown a willingness to use his experience, knowledge, & problem solving abilities to assist other SELRES members, he must take the initiative to develop & exercise his leadership & management skills. Recommended for promotion with his peers after significant performance improvement is documented in next OER.

On November 22, 2004, the applicant submitted an OER Reply,³ which was forwarded without comment by the rating chain for inclusion with the OER. In the Reply, the applicant complained that at the start of his OER counseling session on June 17, 2004, the Supervisor stated that he would not be answering any questions. When at some point the applicant asked for an example of how he had inappropriately assumed tasking of a senior O-3, as alleged in the disputed OER, the Supervisor refused to provide an example and said, "Again, this is not a Q&A session." Regarding the comment about "unsolicited negative remarks" interrupting a counseling session between an O-4 and E-3, the applicant stated that it was unfair because the O-4 in question had told him at the time that his comments were unwelcome. Because the applicant apologized and the matter was never raised again, he thought it had been "resolved at that level."

Regarding the comment in the disputed OER that he had sent argumentative emails without doing research first, the applicant alleged in his OER Reply that he had fully researched the issue by reviewing information about HIPAA on a federal government website; speaking to an expert HIPAA compliance officer employed by the state government; and calling a congressman's office to get confirmation that there was no military exclusion to HIPAA. The applicant further wrote that he was not argumentative in his emails and just respectfully informed them of the legal problem with the form they were distributing. The applicant further noted that the incident occurred outside of the evaluation period for the disputed OER.

Regarding the complaint about his OSF (officer support form) in the disputed OER, the applicant stated that he submitted it to his Supervisor on March 7, 2004, well before the end of the evaluation period and yet "did not receive any request for amplifying information, clarification or inform[ation] of any discrepancies from [the Supervisor or Senior Reserve Officer] until May 9, 2004, when some additional clarifying information was requested."

Regarding the Reporting Officer's comment about his needing "more task direction than should be necessary," the applicant stated that his Supervisor "did not provide any substantive task direction during the OER period. My supervisor consistently failed to provide feedback on information I submitted to him. He routinely neglected to provide guidance on how he wanted me to proceed with nebulous, non-specific projects or tasks."

The applicant retired from the Reserve on December 1, 2004, with more than 27 years of satisfactory service.

VIEWS OF THE COAST GUARD

On November 6, 2007, the Judge Advocate General (JAG) of the Coast Guard recommended that the Board grant partial relief in this case by redacting the following phrase from block 8 of the disputed OER: "Sent argumentative emails to Dept. Head and XO, producing extra admin. work where mbr should have taken initiative to research; e.g., dispute over policy regarding use of health records by CG." The JAG stated that the comment should be redacted because the emails in question were sent outside of the evaluation period for the disputed OER. However, he recommended that the Board grant no further relief. He stated that the redaction of

³ When submitted in accordance with Article 10.A.4.g. of the Personnel Manual, an OER Reply and the endorsements of the rating chain become a permanent part of the OER filed in the officer's personal data record.

the one comment does not justify raising the mark of 3 for “Judgment” to a higher mark for two reasons. First, the JAG argued, a numerical mark on an OER is not based on the written comments. Instead, under Article 10.A.4. of the Personnel Manual, the rating official begins by assigning a numerical mark in accordance with the written standards on the OER form and then adds comments to cite specific examples of the member’s performance under the category. Second, the JAG argued, the remaining negative comment about the applicant’s inappropriate use of a workstation for data streaming.

The JAG also adopted the findings and analysis provided in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC). CGPC stated that the low marks in the disputed OER are properly supported by examples of the applicant’s performance and that the applicant has not overcome the presumption that the marks and comments are correct. CGPC further stated that the rating officials were “in the best position to observe the applicant’s performance and provide a fair, accurate, and objective OER.” CGPC also submitted a declaration signed by the applicant’s Supervisor, who wrote the following:

3. I have reviewed [the applicant’s] complaints ... [about the disputed OER]. Contrary to [his] protest, I believe that the marks for each performance dimension are accurate and appropriate. With one exception, I believe that the OER comments are also accurate and appropriate. The exception is the comment in block 8 [by the Reporting Officer] regarding “argumentative emails to Dept Head and XO.” [The applicant] is correct in stating that the email exchanged with the XO on personnel upkeep requirements for Coast Guard Medical Records was outside of the period of report for his OER under review. However, I strongly reject [the applicant’s] claim that his “sub-standard OER ... was due to my informing ... that the medical release form ... violated HIPAA,” as stated in his letter (dated April 7, 2007) to the Board for Correction of Military Records. His OER is a reflection of his performance over the specific two-year period, and the marks he earned are exclusively for that period of time.

4. It should be noted that ... I was present as the Planning Department Head starting in August 2003. ... For the period June 2002 to July 2003 [which is also covered by the disputed OER], [LCDR P] was [the applicant’s] supervisor. Because I was signing [the applicant’s] OER for a period of report that predated my arrival, I consulted with several officers (including [LCDR P and three others] to document relevant performance issues for [his] OER and validate his Officer Support Form (OSF) input.

5. My first opportunity to meet with the entire Planning Department at MSO/Group ... was in September 2003, at which time I presented my goals and expectations to the officers assigned to it. One of the major efforts I explained was the Department’s leadership role in creating a new Unit Reserve Management Instruction that would align MSO/Group ... Reserve Management program with the recently published Reserve Strategic Assessment Team report released by the Commandant’s Chief of Staff. The other major component of Planning Department work was to write two new unit plans: the Regional Maritime Security Plan ... and the Continuity of Operations Plan (COOP). The tasking that all Reserve and Active Duty Officers received from me centered on these three programs. I offer this information to counter [the applicant’s] claim that “there routinely was not tasking, guidance, input or any direction provided by the Department Head or his designee(s),” and that “[I] was seldom if ever present on drill weekends to provide face-to-face communications and guidance.” These statements, in my opinion, are not true. In fact, [the applicant’s] own OSF documents the meetings on 13 September and 15 November in which I discussed “Planning issues, upcoming projects, and (my) philosophy regarding the Planning Department staff directly and through department mentors. Furthermore [his] OER provides ample evidence of an active performance feedback process (one of the purposes of an OER), documenting his input to the Unit Reserve Management Instruction, for example.

6. It should be noted that [the applicant] has submitted an email record (dated 14 and 18 October 2004) for the Board's consideration as "representative" of a lack of guidance by me and his mentors in the Planning Department. In the email, [he] is requesting extra IDT drill weekends before he retires. The reply from [CDR C] is that "we don't really have anything for you to do" that would justify extra drills in November 2004 and that he should plan on working the same weekend as another officer in the Department. [In addition, the email was written several months after the end of the evaluation period and after the Supervisor had left the Planning Department.]

7. [The applicant's] Officer Support Form (OSF) is poorly documented in my opinion because its emphasis is on administrative tasks and inconsistently focuses on professional development, achieving qualifications, or forwarding the goals and programs of the Department. When it does focus on these issues, there is little evidence of completion or progress. As an example, I suggest that the [applicant's] OSF be examined for the period 11-22 August 2003. During this time of Active Duty for Training (ADT), [the applicant] documented various kinds of office activities that he completed (read email, changed toner cartridges, provided assistance to other personnel with their travel claims, etc.). However, ADT is a two-week period designed for professional training courses and qualifications, not administrative tasks. A Reserve member has a year in which to propose training activities and courses, apply for course materials and request training quotas, and discuss with his supervisor the best fit for professional growth and benefit to the unit. Instead, [the applicant] largely filled his 2003 ADT period with local, administrative tasks. The same is true for many of his weekend drills. This is the essence of the OER comment in block 5, describing his OSF as "... poorly documented, w/ vague or no results recorded, even though 4 IDT drills were used to prepare OER package." ... To ensure the OSF was complete, I asked [LCDR C] to obtain amplifying information because I was concerned with the lack of accomplishment over a two-year period in [the applicant's] primary duties as listed in the Description of Duties (block 2) of his OER. [The applicant] provided additional information, but it did not improve my opinion of the quality or substance of OSF documentation.

8. [Regarding the comments supporting the mark of 3 for "Workplace Climate,"] ... [t]hese incidents did occur before I was assigned as the Planning Department Head at MSO/Group ... in August 2003. They were brought to my attention by [LCDR T] and verified by [LCDR P], who was [the applicant's] supervisor at the time. In addition, [LCDR C] reviewed the OER before submission and verified the information contained in the comments. Since these incidents had a negative impact on the office work environment, were verifiable by eyewitness accounts, and occurred during the OER period of report, I documented them as written in the OER. ...

9. I feel quite strongly that block 10 of [the applicant's] OER remain unchanged. As a rule, [he] did require more task direction than should be necessary for an O-4 and his performance for the OER period is most accurately described as "fair" when compared to his peers in the Coast Guard. During the time in which I was the OER Supervisor, my general observations of [him] were that he was technically proficient in Information Technology systems, and was often willing to help others with computer application and personnel administration problems. What [he] failed to do, in my opinion, was to take the initiative as would be expected of a lieutenant commander in the Coast Guard and contribute to the primary work of the department in a way that would forward its completion and his own professional development, and also in a way that would promote a professional and productive work environment.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 27, 2007, the Chair received the applicant's response to the views of the Coast Guard. Regarding the comment about his alleged interruption of a counseling session, the applicant argued that it should not have been mentioned in the OER because the Supervisor did not investigate it and it was based on one officer's uncorroborated statement. He argued that LCDR P could not have verified the incident because he was not a witness to it and was transferred out of the Planning Department before it occurred. The applicant argued that if the Super-

visor thought the incident was appropriate for mention in the OER, he was obligated to speak to the applicant about it. Regarding his OSF, the applicant argued that it is irrefutably detailed in nature.

The applicant alleged that the OER's inclusion of a comment about his performance after the end of the evaluation period proves that his Supervisor was not acting lawfully or in good faith. He stated that the Supervisor's refusal to answer his questions and provide more specific examples of performance during the OER counseling session also proves that the Supervisor did not act in good faith. He stated that LCDR C would confirm that the Supervisor insisted that the counseling session would not be a Q&A session, but did not submit a statement from him. Therefore, the Supervisor's declaration should be deemed to lack veracity, merit, and evidentiary weight since he violated multiple provisions under the Personnel Manual.

The applicant alleged that the OER was prepared in retaliation for his complaint about the non-HIPAA-compliant form distributed throughout the unit. Therefore, he argued, it violated the "No Fear Act," Public Law 107-174 and 45 CFR § 164.530(g).

Regarding the Supervisor's claims to having provided tasking, the applicant stated that while the Supervisor did attend meetings on September 13 and November 15, 2003, "to the best of my knowledge he attended no more meetings or provided in-person, email, or other written tasking. I encourage the Board to pull the computer login information for MSO/Group ... to substantiate my claim of his lack of visibility during IDT drill weekends. If [the applicant] did provide tasking as he claims, then I ask that he provide the documentation to prove his assertion."

APPLICABLE REGULATIONS

Article 10.A.1.b.1. of the Personnel Manual provides that "[c]ommanding officers must ensure accurate, fair, and objective evaluations are provided to all officers under their command."

Article 10.A.1.c.5. states that "[n]o 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)."

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

- b. Requests an appointment with the Supervisor, to occur not later than 21 days before the beginning of each reporting period, if clarification of duties and areas of emphasis is needed. ... A meeting shall be requested not later than seven days after reporting aboard a new unit.
- c. As necessary, seeks performance feedback from the Supervisor during the period.
- d. Prepares OER Section 1, ... 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. ...

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. includes the following among the responsibilities of a Supervisor:

- a. Evaluates the performance of the Reported-on Officer in the execution of duties.
- b. Provides direction and guidance to the Reported-on Officer regarding specific duties and responsibilities.
- c. Discusses at the beginning of the period, upon request, or when deemed necessary, the Reported-on Officer's duties and areas of emphasis. The optional OSF worksheet, or other format specified by the Supervisor, may be used as an aid.
- d. Encourages the use of the optional OSF worksheet, or other convenient means, to note important aspects of the Reported-on Officer's performance during the reporting period. Significant events, problems, achievements, failures, or personal qualities should be noted.
- e. Provides performance feedback to the Reported-on Officer upon that officer's request during the period or at such other times as the Supervisor deems appropriate.
- f. Counsels the Reported-on Officer at the end of the reporting period if requested, or when deemed appropriate, regarding observed performance. Discusses duties and responsibilities for the subsequent reporting period and makes suggestions for improvement and development.

Article 10.A.2.e.2. includes the following as responsibilities of a Reporting Officer:

- a. Bases evaluation on direct observation, the OSF or other information provided by the Supervisor, and other reliable reports and records.
- 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. ... 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. The Reporting Officer may not direct that an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.). ...
- f. Provides performance feedback to the Reported-on Officer as appropriate.

Article 10.A.4.c.4. provides the following instructions for Supervisors completing the first 13 numerical marks on an OER form in blocks 3, 4, and 5 (similar instructions are provided for Reporting Officers, who are responsible for the last 5 numerical marks in block 8 of the OER form, in Article 10.A.4.c.7.):

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.a. states that on the comparison scale in an OER, a Reporting Officer “shall fill 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.”

Article 10.A.4.f.11. states that in preparing an OER it is prohibited to “[d]iscuss Reported-on Officer’s performance or conduct which occurred outside the reporting period.”

Article 10.A.4.g. allows an officer to submit a written OER Reply within fourteen days of receiving any OER in order to “express a view of performance which may differ from that of a rating official.” An OER Reply is forwarded to CGPC through the rating chain, whose endorsements may include comments about the OER Reply.

The written standards for numerical marks in the categories “Workplace Climate,” “Evaluations,” and “Judgment” on an OER form appear as follows:

<p><u>Workplace Climate</u></p> <p>Ability to value individual differences and promote an environment of involvement, innovation, open communication, and respect.</p>	<p>1</p> <p>Intolerant of individual differences, exhibited discriminatory tendencies toward others. Tolerated or contributed to an uncomfortable or degrading environment. Failed to take responsibility for own words and actions and their impact on others. Failed to support or enforce Coast Guard human resources policies.</p> <p><input type="radio"/></p>	<p>3</p> <p>Sensitive to individual differences. Encouraged open communication and respect. Promoted an environment which values fairness, dignity, creativity, and diverse perspectives. Took responsibility for own words and actions and their impact on others. Fully supported and enforced Coast Guard human resources policies.</p> <p><input checked="" type="radio"/></p>	<p>5</p> <p>Excelled at creating an environment of fairness, candor, and respect among individuals of diverse backgrounds and positions. Optimized use of different perspectives and opinions. Quickly took action against behavior inconsistent with Coast Guard human resources policies, or which detracted from mission accomplishment.</p> <p><input type="radio"/></p>	<p>7</p> <p><input type="radio"/></p>
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<p><u>Evaluations</u></p> <p>The extent to which an officer, as Reported-on Officer and rater, conducted or required others to conduct accurate, timely evaluations for enlisted, civilian and officer personnel.</p>	<p>1</p> <p>Reports were frequently late. Narratives inaccurate or of poor quality. Failed to uphold service performance standards by assigning accurate marks. Reports required revision or intervention by others. Failed to meet own OES responsibilities as Reported-on Officer.</p> <p><input type="radio"/></p>	<p>3</p> <p>Reports consistently submitted on time. Narratives were fair, concise, and contained specific observations of action and impact. Assigned marks against standards. Few reports, if any, returned for revision. Met own OES responsibilities as Reported-on Officer.</p> <p><input checked="" type="radio"/></p>	<p>5</p> <p>No reports submitted late. Narratives were insightful, of the highest quality, and always supported assigned marks. Subordinates’ material reflected same high standards. No reports returned for revision. Returned reports to subordinates when appropriate.</p> <p><input type="radio"/></p>	<p>7</p> <p><input type="radio"/></p>
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<u>Judgment</u> Ability to make sound decisions and provide valid recommendations by using facts, experience, common sense, and analytical thought.	1 <input type="radio"/>	Decisions often displayed poor analysis. Failed to make necessary decisions, or jumped to conclusions without considering facts, alternatives, and impact. Did not effectively weigh risk, cost, and time considerations.	3 <input checked="" type="radio"/>	Demonstrated analytical thought and common sense in making decisions. Used facts, data, and experience, and considered the impact of alternatives. Weighed risk, cost, and time considerations. Made sound decisions promptly with the best available information.	5 <input type="radio"/>	Combined keen analytical thought and insight to make appropriate decisions. Focused on the key issues and the most relevant information, even in complex situations. Did the right thing at the right time. Actions indicated awareness of impact and implications of decisions on others.	7 <input type="radio"/>
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FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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 10 U.S.C. § 1552. The application was timely.

2. The applicant asked the Board to make several corrections to his OER for the period June 1, 2002, to April 30, 2004. To establish that an OER is erroneous or unjust, an applicant must prove that it was adversely affected by (a) a “misstatement of significant hard fact,” (b) a “clear and prejudicial violation of a statute or regulation,” or (c) factors that “had no business being in the rating process.”⁴ The Board begins its analysis in every case 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 Absent evidence to the contrary, the Board presumes that the applicant’s rating chain prepared the disputed OER “correctly, lawfully, and in good faith.”⁶

3. The applicant asked the Board to raise his mark of 3 for “Workplace Climate” and to remove the following supporting comments from block 5 of the disputed OER: “However, some episodes of unwelcome behavior contributed to poor office climate, e.g., unsolicited negative remarks interrupted counseling session between E-3 and O-4 in adjacent office cubicle, sensitive email sent unit wide, and inappropriate assumption of tasking authority w/ a senior O-3 in Dept.” The applicant argued that the mark and comments are unfair because his Supervisor did not witness the “unsolicited negative remark” and never asked him about it and because during an OER counseling session after the evaluation period, the Supervisor refused to cite examples of his “inappropriate assumption of tasking authority.”

4. The Supervisor stated that the performance reflected in this first disputed comment occurred before he assumed leadership of the Planning Department in August 2003 and that he was informed about it by other officers and discussed their complaints with the applicant’s prior supervisor. Articles 10.A.2.e.2.a. and 10.A.4.c.4.d. of the Personnel Manual expressly

⁴ *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.

⁵ 33 C.F.R. § 52.24(b).

⁶ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

authorize Supervisors to base the marks and comments in an OER on the reliable reports of other officers and supervisors. Although the applicant complained that the Supervisor never counseled him about these matters before including them in the OER, the Supervisor was not his supervisor at the time the incidents occurred. The applicant did not say that no one ever counseled him about these matters—only that the Supervisor did not counsel him about poor behavior that had preceded his arrival in the Department in August 2003. The applicant does not deny making the “unsolicited negative remarks,” but indicates that he assumed they would not affect his OER because he had already apologized. Nor did he deny sending a sensitive email unit-wide. The fact that the applicant’s “inappropriate assumption of tasking authority” occurred prior to the Supervisor’s arrival may well explain his refusal to discuss the details with the applicant during the OER counseling session. However, Supervisors are permitted to rely on second-hand reports from other officers and supervisors when preparing an OER. The Supervisor arrived at the Department about two-thirds of the way through the evaluation period, and it was not unreasonable for him to rely on reports from the applicant’s prior supervisor and other officers in preparing the OER. Aside from his own allegations, the applicant has submitted no evidence to support his claims that this comment and the mark of 3 for “Workplace Climate” are false and unfair. Therefore, the Board finds that the applicant has not proved by a preponderance of the evidence that they should be corrected.

5. The applicant alleged that the mark of 3 he received for “Evaluations” on the disputed OER and the following supporting comment for the low mark are erroneous and unjust: “OSF poorly documented, w/ vague or no results recorded, even though 4 IDT drills were used to prepare OER package.” Under Article 10.A.2.c.2. of the Personnel Manual, officers may submit to their supervisors “a listing of significant achievements or aspects of performance which occurred during the period.” The applicant submitted a copy of his purported OSF, which shows a list of tasks he performed and meetings he attended for each period of duty. His lists say almost nothing about significant achievements or the goals of his work. The Board agrees with the Supervisor that the applicant’s task lists would be of very little help, if any, to a rating official trying to prepare an OER. The fact that no one complained about the quality of his OER input for a few weeks does not prove that the quality of that input was acceptable. The applicant has not proved by a preponderance of the evidence that the mark of 3 he received for “Evaluations” or the supporting comment about his OER input are erroneous or unjust.⁷

6. The applicant alleged that the low marks and comments in the Supervisor’s section of the OER were included in retaliation for his objection to the blanket medical release form distributed to all the reservists by the Group command. However, when the applicant first emailed his objection to the form to the Supervisor on June 10, 2004, the Supervisor replied without any evidence of hostility that the Medical Manual indicated that the release form was proper and that the applicant should ensure that the unit’s health technician could get his civilian medical records. There is no evidence in the record that the Supervisor became angry or felt he had cause to retaliate when the applicant explained to the XO that the form was improper under HIPAA. The applicant has not proved by a preponderance of the evidence that the Supervisor’s

⁷ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976) (holding that for purposes of the BCMRs under 10 U.S.C. § 1552(a), “injustice” means “treatment by military authorities that shocks the sense of justice, but is not technically illegal”).

marks and comments in the disputed OER were prepared in retaliation for his objections to the blanket medical release form distributed by the Group command.

7. The applicant asked the Board to raise the mark of 3 he received for “Judgment” and to remove the following supporting comments from the Reporting Officer’s section of the disputed OER: “Sent argumentative emails to Dept. Head and XO, producing extra admin. work where mbr should have taken initiative to research; e.g., dispute over policy regarding use of health records by CG. Inappropriate use of CG Workstation III for ‘data streaming’ acknowledged and practice ended.” The applicant alleged that the comments about his emails were false because they were not argumentative and he did research the issue. He also alleged that the emails occurred outside of the reporting period and that the low mark and comments were prepared in retaliation for his objection to the blanket medical release form. He did not deny the comment about his inappropriate use of a workstation.

8. The Coast Guard stated that the comments about the “argumentative emails” should be removed from the OER because the emails were sent after the evaluation period ended, and under Article 10.A.4.f.11. of the Personnel Manual, performance that occurred outside of the evaluation period may not be mentioned in an OER. The Board agrees with this assessment.

9. The Coast Guard argued that the applicant is not entitled to have the mark of 3 for “Judgment” raised because that mark is also supported by the remaining, unchallenged negative comment about the applicant’s inappropriate use of a workstation for data streaming and because under Article 10.A.4. of the Personnel Manual, the Reporting Officer begins by assigning the numerical mark in accordance with the written standards on the OER form and then adds comments to cite specific examples of the member’s performance under the category.

10. Although it is true that under Article 10.A.4.c.7. of the Personnel Manual, rating officials are supposed to complete an OER first by assigning numerical marks for each performance category and then by adding comments to provide specific examples of performance that supports the numerical marks, it is clear that in assigning the applicant a mark of 3 for “Judgment,” his Reporting Officer knew about and included the HIPAA emails in his review of the applicant’s performance under this category. Otherwise, the negative comment about the emails would not have been included in support of the mark of 3. Therefore, the Board finds that the mark of 3 for “Judgment” was supported at least in part by the applicant’s performance outside of the evaluation period.

11. Although the mark of 3 for “Judgment” was supported at least in part by emails the applicant sent outside of the reporting period, the Board is not persuaded that the mark should be raised just because the comment about the “argumentative emails” should be removed. While the Reporting officer apparently mentioned the “argumentative emails” in the OER because he thought they showed poor judgment, there is no evidence that the emails had any negative impact on the Reporting Officer or Supervisor that would be motivation for retaliation. In addition, although the space for comments on an OER form is quite limited, the Reporting Officer included another example of the applicant’s performance to support the low mark (misuse of the workstation). Moreover, the OER documents other incidents reflecting poor judgment on the part of the applicant, such as his interruption of a counseling session with “unsolicited negative remarks,” his decision to send a sensitive email unit wide, and his “inappropriate assumption of

tasking authority w/ a senior O-3.” The applicant has not proved by a preponderance of the evidence that the mark of 3 he received for “Judgment” is erroneous or unjust.

12. The applicant asked the Board to raise his mark on the comparison scale from the third spot to the fourth or fifth spot and to remove the following comment from block 10: “At times, requires more task direction than should be necessary for an O-4.” He submitted an email conversation, dated several months after the end of the evaluation period, in which an officer tells him there is not enough work to schedule him for double the usual number of drills. This evidence is insufficient to prove that the applicant was denied appropriate tasking during the evaluation period or that the disputed comment in block 10 is erroneous or unfair. The applicant has failed to prove that any of the comments in that block or the mark on the comparison scale should be corrected.

13. The applicant argued that the Supervisor, in telling him twice during their OER counseling session that it was not a “Q&A,” unjustly denied him counseling. The applicant failed to prove that the Supervisor’s demeanor and attitude during the counseling session were inappropriate. Moreover, even if he had such evidence, it would not prove that any part of the OER was erroneous or unfair since the OER counseling session occurred after the evaluation period and so any counseling the applicant feels he failed to receive because of the Supervisor’s alleged attitude could not have affected the applicant’s performance during the evaluation period. In addition, the Supervisor’s alleged refusal to answer questions during the OER counseling session does not prove that the applicant did not receive timely, appropriate feedback throughout the evaluation period.

14. Accordingly, the Board should grant partial relief by removing from block 8 of the disputed OER the comment about the “argumentative emails,” but all other requested relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR (retired), for correction of his military record is granted in part as follows:

The Coast Guard shall remove this comment from block 8 of his officer evaluation report (OER) for the period June 1, 2002, through April 30, 2004: "Sent argumentative emails to Dept. Head and XO, producing extra admin. work where mbr should have taken initiative to research; e.g., dispute over policy regarding use of health records by CG."

All other relief is denied.

Philip B. Busch

Dorothy J. Ulmer

George A. Weller