

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2011-035**

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**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 upon receipt of the applicant's completed application on December 3, 2010, 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 July 28, 2011, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant asked the Board to correct an officer evaluation report (OER) covering his service as a deck watch officer and head of the Deck Department on a cutter from February 1 to June 29, 2009, by raising certain numerical marks and removing negative comments from the OER or by removing the OER from his record in its entirety and replacing it with a continuity OER. He also asked the Board to remove his non-selection for promotion to lieutenant (LT) by the LT selection board that convened in September 2010 and to award him back pay and allowances. He alleged that the disputed OER contains unauthorized marks and comments and is an inaccurate assessment of his performance during the reporting period. The applicant stated that low marks and negative comments on the disputed OER are unauthorized because they are based on performance that occurred before the reporting period for the disputed OER,<sup>1</sup> when he was still an ensign.<sup>2</sup>

The disputed OER, which is attached, shows that the applicant received high marks of 5, 6, and 7 in many performance categories,<sup>3</sup> but an average mark of 4 for "Workplace Climate"

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<sup>1</sup> Articles 10.A.4.c. and 10.A.4.f.11. of the Personnel Manual prohibit marks and comments based on performance that occurred outside of the reporting period for the OER.

<sup>2</sup> The applicant was promoted from ensign to lieutenant junior grade (LTJG) on November 23, 2008.

<sup>3</sup> In OERs, officers are evaluated in 18 different performance categories, such as "Professional Competence," "Teamwork," and "Initiative," on a scale of 1 to 7, with 7 being best.

from his supervisor,<sup>4</sup> the Executive Officer (XO) of the cutter, and an average mark of 4 for “Judgment,” a low mark of 3 for “Responsibility,” and a mark of 4 on the Comparison Scale from his reporting officer, the Commanding Officer (CO) of the cutter.<sup>5</sup> The applicant asked the Board to raise these marks to marks of 6. The negative supporting comments in the OER, which the applicant wants the Board to remove, show that at least some of these marks were assigned because of the applicant’s involvement with a “quote book” found aboard the cutter:

- “Participation in inappropriate and unprofessional behavior surrounding a quote book and failure to stop the quote book showed serious lack of responsibility.”
- “Ready for more challenging assignments despite set back in responsibility, his personal accountability for poor decision showed high moral character and is indicative of his potential to be a successful CG officer.”

The applicant stated that he reported aboard the cutter in July 2007 and sometime in the fall of 2007, while he was training to be a deck watch officer, he was shown a “quote book”—sometimes called a “bridge quote log” or “quote log”—that had been started by the cutter’s bridge watch in 1999. He was told it was a tradition of the cutter and that anyone on the bridge could contribute to it. The applicant alleged that he understood the book was supposed to contain “witty and appropriate humor” based on the “high caliber” of the officers who showed it to him, the length of time it had been in use, and its location on the bridge.

The applicant stated that in the spring and summer of 2008, before the reporting period for the disputed OER, he was involved in four conversations that were recorded in the quote book. To the best of his recollection, the four conversations were the following:

- 1) Lookout: “That oil rig looks like it’s sitting on coffee cans.”  
Applicant: “Coffee cans?”  
Lookout: “Yeah, you know, giant coffee cans.”
- 2) Applicant: “I’m really busy right now. I have all of the deckies’ marks to do.”  
Boatswain’s Mate of the Watch: “Marks? I just had marks done about a month ago.”  
Applicant: “Those were disciplinary marks.”
- 3) Lookout: “Sir, there is a floating rock off our starboard bow.”  
Applicant: “Rocks don’t float.”

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<sup>4</sup> An officer is evaluated by a “rating chain” of three superior officers, including a supervisor, who completes the first 13 marks on the OER; a reporting officer, normally his supervisor’s supervisor, who completes the rest of the OER; and an OER reviewer, who reviews the OER for consistency and comportment with regulations.

<sup>5</sup> On an OER Comparison Scale, the reporting officer assigns a mark by comparing the reported-on officer to all other officers of the same grade whom the reporting officer has known throughout her career. Although the marks on the scale are not numbered, there are 7 possible marks, which range from a low of “unsatisfactory” for a mark in the first spot to a high of “a distinguished officer” for a mark in the seventh spot. A mark in the third, fourth (middle), or fifth spot on the scale denotes the officer as “one of the many competent professionals who form the majority of this grade.” A mark in the sixth spot denotes “an exceptional officer.”

- 4) Applicant (to a seaman at the helm not paying attention): “(Seaman’s name)! Less here (pointing to himself), more there (pointing to the helm)!”

The applicant stated that in the late summer of 2008, following a discussion among some of the officers about the offensive content of the quote book, the Assistant Operations Officer (AOO) took the book off the bridge. The applicant never saw the quote book on the bridge again. However, in early April 2009, three months before the end of his tour aboard the cutter, he was advised that the Commanding Officer (CO) had discovered the old quote book on the bridge, and she read aloud from it at an Officers’ Call (meeting).

The applicant stated that the mark of 3 for “Responsibility” was based on the quote book incident, which occurred before the reporting period and is an inaccurate assessment of performance under this category during the reporting period. The applicant alleged that during the reporting period, he held several very responsible positions, such as Boarding Officer, Deck Watch Officer, Helicopter Control Officer, Inport Officer of the Day, and Over the Horizon Mission Commander, and conducted himself accordingly. At one port of call, he ensured an on-time departure by preventing some of the crew from imbibing alcohol after midnight. He carefully documented the poor performance of one non-rate, which facilitated the member’s expedited discharge. As First Lieutenant of the cutter, he demonstrated “exceptional project management skills and maintenance of the ship’s material condition during two extensive inport periods, despite the absence of guidance or mentorship from a permanent chief petty officer in the Deck Department.” Furthermore, the applicant noted that the CO had assigned him marks of 6 in this category on his two prior OERs.

Regarding the mark of 4 for “Workplace Climate,” the applicant stated that it is also prohibited because it is based on the quote book incident—i.e., conduct that occurred outside the reporting period for the disputed OER. The applicant also argued that the mark is inaccurate and provided two examples of how he excelled in this category. First, when it came to his attention that a crewmember was made extremely uncomfortable by crewmates who viewed “inappropriate material in their common berthing space,” the applicant counseled the entire Deck Department and “directed that all viewing of inappropriate material onboard the ship was to stop immediately” to “create[] a safe, respectful and healthy working environment for the crew.” Second, the applicant alleged that he recognized the potential in a seaman apprentice who was faced with financial and personal hardship and helped the member resolve his problems so that the member was able to earn his rate as a boatswain’s mate. The applicant stated that his handling of the member, who many believed could not succeed, “conveyed a strong and positive message to the crew that they would receive fair and equal treatment.” The applicant noted that he had received marks of 6 in this category on his two prior OERs, and there is nothing to indicate that this aspect of his performance declined during the reporting period.

Regarding the mark of 4 for “Judgment,” the applicant alleged that it is also based on the quote book incident and therefore prohibited by the Personnel Manual. He noted that his CO described his judgment as “excellent” in the OER, and he had received marks of 6 and 7 in this category on his prior two OERs. The applicant noted that there are no comments critical of his judgment in the disputed OER except the prohibited comments about the quote book. The applicant noted that three other comments in the disputed OER show how his judgment during the

reporting period met the requirements for a mark of 6. First, he stated that as the Conning Officer during an outbound transit from Aruba in high wind, he noticed dangerous shoals and a shallow reef very close to the cutter and took action to avoid them. Second, he stated that as the Deck Supervisor during ten special sea details and a two-week training period involving numerous anchoring evolutions, man-overboard drills, towing exercises, etc., he ensured that his department received a score of 98% with zero safety incidents. Third, the applicant pointed out that an OER comment shows that his decisionmaking and leadership exceeded expectations when he was serving as the Boarding Officer during the board of a fishing vessel that yielded more than 2,000 pounds of cocaine and five drug traffickers.

Regarding his CO's mark in the fourth spot of the Comparison Scale, the applicant noted that the CO had previously assigned him a mark in the sixth spot, as an "exceptional officer," in his prior two OERs and that the only basis for assigning him a lower mark was the quote book incident—i.e., conduct that occurred prior to the reporting period—as shown by the comment about a "set back in responsibility" in the comment block below the Comparison Scale.

The applicant alleged that he was passed over for promotion to lieutenant by the LT selection board that convened in 2010 because of these prohibited and erroneous marks and comments. He asked the Board to correct the OER by raising the disputed marks to marks of 6 or to remove the OER from his record and to adjust his date of rank and award him back pay and allowances.

#### ***PRRB Decision on LTJG X's OER for February 1 to May 28, 2009***

In support of his allegations, the applicant submitted a decision of the Personnel Records Review Board (PRRB) concerning the OER of LTJG X, one of the other officers held accountable after the CO discovered the quote book. LTJG X provided the applicant a copy of the PRRB's decision for his BCMR application. The PRRB's decision shows that based on statements solicited from LTJG X's rating chain about his low marks for Directing Others, Responsibility, and Professional Presence, which are summarized below, the PRRB concluded that LTJG X's OER for the period February 1 to May 28, 2009, should be removed from his record because the XO had been improperly directed by the CO to lower the mark he assigned for Directing Others based on performance not related to the quote book and because the low marks for Responsibility and Professional Presence were based on LTJG X's contributions to the quote book, which occurred before the start of the reporting period for the OER. The PRRB found that prior to the reporting period for the OER, several officers who served on the bridge as Officer of the Day discussed the offensive content of the quote book, gave the quote book to the AOO "for disposition," and "rightfully assumed the issue was resolved."

The PRRB found that the CO, who served as the Reviewer for LTJG X's OER, found the quote book in April 2009 and "wrongfully based her view of the applicant's performance on the date she personally discovered the quote log and not based on the date when the performance actually occurred." The PRRB found that the quote book had been removed from the bridge by the Assistant Operations Officer before the reporting period began and that any adverse effect on morale caused by the quote book during the reporting period resulted from the CO's discovery of and response to the quote book, including an all-hands "stand down," which created a "command

climate issue.” The PRRB noted that when a command discovers poor performance that occurred before the current reporting period, the command may prepare an “exception OER” but may not document such past performance in the officer’s current regular OER. The PRRB’s decision to replace LTJG X’s disputed OER with a “Continuity OER” was approved by the Director of Personnel Management on September 13, 2010.

***Statement of the Operations Officer of the Cutter to the PRRB***

The OO, who supervised LTJG X from June 2007 through May 2009, stated that after he submitted his draft of LTJG X’s OER, “it was made clear to me that anything other than [a mark of 2 in the category “Directing Others”] would not be approved by my chain of command and therefore I should make the edits as advised.” The OO stated that the other low marks and comments in the OER were based on LTJG X’s involvement with the quote book. The OO claimed to be unaware of any of the contents except what the CO read aloud during the Officers’ Call, which was clearly unprofessional. He noted that the officers who were held accountable for the contents of the quote book did not necessarily make any inappropriate quotations in it themselves and may not have read it all the way through or known about the offensive matter that the CO found.

***Statement of the Executive Officer of the Cutter to the PRRB Regarding LTJG X’s OER***

The Executive Officer (XO), who served as LTJG X’s reporting officer (and who is the supervisor who assigned the applicant a mark of 4 for “Workplace Climate”), stated that the CO had directed him to lower LTJG X’s mark for “Directing Others” to a 2 and that he had assigned LTJG X a mark of 2 for “Responsibility” because he

participated in a repulsive and vulgar quote book as I described in section 8 of his OER. While the commanding officer discovered and maintained custody of the quote book, she did read some of the entries to me and to the wardroom as examples of some of the severely offensive and inappropriate content. The commanding officer was very clear about how deeply offended she was by the entries in the book as was I upon hearing them. Additionally, the commanding officer described to me additional entries documenting discussions, vulgar language, and behavior by underway watch personnel that caused her great concern and doubt about the professionalism and senior/junior relationships taking place on the bridge. It is my opinion that, while no crewmember openly indicated that they were offended by the book, the entries highlighted to me were completely inappropriate and in violation of the Commandant’s Anti-Harassment & Hate Incident Policy.

The XO also stated that he assigned LTJG X a mark of 3 for “Professional Presence” and assessed his potential as an officer in the last block of the OER based on LTJG X’s participation in the quote book.

***Statement of the Commanding Officer of the Cutter to the PRRB Regarding LTJG X’s OER***

The CO of the cutter served as LTJG X’s OER reviewer (and the applicant’s reporting officer). She stated that she supported LTJG X’s mark of 2 for “Responsibility” based on his participation in the quote book, which she discovered on the bridge during the reporting period. She stated that the quote book contained “references to perverted, disgusting, and at best unpro-

fessional behavior that took place on the bridge and elsewhere aboard the [cutter]. The quote book was not routinely stored in open view. ... The book was stopped and counseling given only after I discovered it. [LTJG X] seems to take refuge in the fact that the book existed for several years. [He] had ample opportunity to stop the offensive behavior and the documentation of it. [He] did not speak up and he did not get involved in the solution.” The CO also supported LTJG X’s mark of 3 for “Professional Presence” because of his implicit condoning of the quote book during the reporting period.

## **VIEWS OF THE COAST GUARD**

The Coast Guard submitted two memoranda with conflicting views of this matter. In a memorandum dated March 25, 2011, constituting the program input for the advisory opinion on the application, the Personnel Service Center (PSC) recommended granting only partial relief by raising the mark of 4 for “Workplace Climate” to a mark of 6. The PSC based this recommendation on affidavits from the applicant’s rating chain, which are summarized below. However, in an advisory opinion dated May 3, 2011, the Judge Advocate General (JAG) recommended that the Board grant the alternative request for relief by removing the disputed OER from the applicant’s record, replacing it with a Continuity OER,<sup>6</sup> removing the applicant’s failure of selection for promotion to LT in 2010 so that he will have two more opportunities for promotion, and backdating his date of rank if selected for promotion by the first board to review his corrected record.

### ***PSC’s Program Input***

The PSC recommended that the Board raise the applicant’s mark of 4 for “Workplace Climate” to a mark of 6 but to deny all other requested relief based upon sworn declarations received from the applicant’s rating chain. The PSC stated that the mark for “Workplace Climate” should be raised because the applicant’s supervisor, the XO of the cutter, has stated that he assigned the mark of 4 at the direction of the CO based on the quote book incident and that he supports raising the mark to a 6. The PSC stated that it “believes that the supervisor was directed by the reporting officer to align his assessment with her view of the applicant’s performance in that one particular dimension, thus resulting in a lower mark than would otherwise have been assigned.” The PSC stated that the CO’s comments about this mark are not dispositive because only the XO, as the supervisor, was allowed to assign the mark.

The PSC stated that no further corrections to the disputed OER are warranted because the CO has stated that many entries in the quote book were dated during the reporting period for the disputed OER and that the existence and location of the book was common knowledge among senior bridge watchstanders, including the applicant, who spent many hours on the bridge as the Officer of the Day and admitted to her that he knew about the quote book.

The PSC stated that it is unclear whether the applicant himself made any entries in the quote book during the reporting period, but it is “more probable that Applicant was aware of the

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<sup>6</sup> A Continuity OER contains a description of the officer’s position, duties, and responsibilities during the reporting period but no evaluative marks or comments.

book on the bridge during the evaluation period and he failed to take action.” Because the applicant was a frequent watchstander on the bridge and supervised 20 members of the Deck Department, “it is unlikely that [he] was unaware of the continued use of the quote book” during the reporting period, and he “had a duty to put a stop to it.” The PSC stated that the comment about the quote book in block 8 of the applicant’s OER “is generic enough and appropriately refers to [the applicant’s] conduct during the period of report. The references to the ‘quote book’ should not be stricken from the OER as they speak to performance that occurred within the period of report.” The PSC alleged that the XO’s comments about the marks and comments in the CO’s portion of the OER are not relevant because only the CO is responsible for that portion of an OER.

The PSC concluded that with the exception of the mark for “Workplace Climate,” the disputed OER is a fair and accurate assessment of the applicant’s performance during the reporting period. The PSC noted that a mark of 4 is the “expected standard” of performance for an officer and so the “PSC cannot speculate whether the applicant would have been selected by the board” if the applicant had received a mark of 6 for “Workplace Climate,” instead of a 4. The PSC noted that, of the 518 candidates for promotion to LT in 2010, only 447 were selected, and argued that the applicant has not shown that he was one of the best qualified candidates for promotion.

The PSC did not in any way address or distinguish this case from the PRRB case of LTJG X or from the case of the applicant in BCMR Docket No. 2011-082 (not yet decided by the Board), in which the PSC recommended removing the OER of another LTJG who stood watches on the bridge of the cutter.

### ***Declaration of the XO of the Cutter***

The XO of the cutter, who as the applicant’s supervisor assigned him a mark of 4 for “Workplace Climate” in the disputed OER, stated that he fully concurs with the applicant’s contentions about the OER. The XO stated that he had no knowledge of the quote book until the CO told him about it, but she did not let him read it or tell him specifically what the applicant wrote in it. The XO stated that he discussed the book with the junior officers involved, including the applicant, after the CO told him about it, and the junior officers told him “that they removed the book from the bridge many months ago. I support [the applicant’s] assertion that the Assistant Operations Officer informed him that the book was removed in late summer of 2008. ... Additionally, I have no facts to refute [the applicant’s] assertion that he was not aware that the book was returned to the bridge.” The XO stated that as far as he knows, the negative content of the disputed OER was all based on “the entries [the applicant] made in a quote book ... prior to the marking period in question.”

Regarding the applicant’s OER marks, the XO stated that the applicant should have received marks of 6 for “Responsibility” and “Judgment,” instead of marks of 3 and 4, based on his performance during the reporting period. In addition, the XO admitted that he had assigned the applicant a mark of 4 for “Workplace Climate” “in compliance with the commanding officer’s direction to document [the applicant’s] participation in the quote book in his OER in the ‘Workplace Climate’ section. Had I not been directed as such, I would have assigned a mark of

6.” The XO also stated that he believes the applicant received a mark of 4 on the Comparison Scale because of his involvement with the quote book, which the CO insisted was “career altering.” The XO stated that the applicant’s performance, as documented by most of the high marks and laudatory comments in the disputed OER, merited a mark of 6 (“exceptional officer”).

### *Declaration of the CO of the Cutter*

The CO stated that contrary to the applicant’s claim, she knows that his involvement with the quote book took place during the reporting period for the disputed OER because she discovered the book in April 2009 and had several conversations with the applicant about the book during which he

4. ... acknowledged the book’s existence, its inappropriate content, and his lack of action. ... A commissioned officer and Department Head, [he] should have recognized the inappropriateness of the book and should not have joined in. He had a duty to take action even if it were to remove it himself. ...

b. However lighthearted the quotes are that [the applicant] attempted to recall, the nature of the book and behavior detailed in the book are neither witty nor appropriate. The quote book contains references to perverted, disgusting, and unprofessional behavior directly in opposition to Coast Guard core values that took place on the Bridge and elsewhere. The book details sex acts, including ... . The book documents disrespect from officers to enlisted members (“How’s it goin [m.f.] Petty Officer”). During the marking period references to “my black ass” and “fuckin” are recorded as well as a reference to the male sexual organ. In addition, during the period disrespect from enlisted members to officers (“Sir, I could definitely see you being sold into sex trafficking”) is recorded. During the period, [the applicant] was in a position to stop this behavior....

5. I know that the book was active and located on the bridge during the marking period. I found the book on the bridge in April 2009. I know that unprofessional behavior and the documentation of unprofessional behavior happened during the period of report because of specific dates written in the book and next to entries. One title of entries is labeled “Mar-May ‘09”. [The applicant] was an Officer of the Deck during the period and stood that watch on the bridge. I knew that [he] knew about the book when just days after my discovery of the book, he requested an audience with me to discuss the book. [He] clearly indicated to me his knowledge of the book, its location, its content, his participation in it and the inappropriateness of it. ...

a. I do not believe [the applicant’s] statement that he never saw the quote book on the bridge again after the summer of 2008. During the marking period, after I had discovered the book, I had at least four conversation with [him] concerning the book. Not once, during any of those conversations, did he contest his knowledge of the book, my interpretation of his involvement with the book, or his lack of action to stop it. He never told me that he hadn’t seen the book in months. During his last patrol aboard the [cutter], during the marking period, the book was active and on the bridge. There was recent information in the book. An entry was made by bridge watchstanders on 09 Apr 09, just days before my discovery of the book. The book had not been dormant. When presented with the [disputed OER, the applicant] never raised any issue refuting the marks or comments he received, and rather to the contrary, he continued to acknowledge his role. ...

7. ... a. ... During the period, while underway, [the applicant] stood watch on the bridge and while inport he made regular rounds of the bridge. His subordinates and watchstanders made entries in the book. Whatever [he] claims he was told by [the AOO], a subordinate, the fact is the book was on the bridge during the marking period. After confiscating the book I discovered that the book and its location was common knowledge among senior bridge watchstanders, including

[the applicant]. It is not credible to believe that ... [he] did not know about it. It is unlikely that as a frequent watchstander during the period he would not know about the book's current [continued] existence. Furthermore, based on his reaction when I discovered the book, it was and still is clear to me that [he] was a willing participant in the unprofessional behavior and the recording of the unprofessional behavior and that he knew the location of the book. ...

c. During the period, [the applicant] was the Deck Department Head. He supervised 20 crewmembers in the Deck Department who routinely stood watch on the bridge. During this period, [he] enabled boorish and perverted behavior by turning a blind eye to it. He created the precedence that not only was the behavior acceptable but writing it down as if to celebrate it was acceptable also. Members he directly supervised made entries or were quoted during the period.

d. ... [The applicant] did not speak up when necessary. As a relatively senior member of the command cadre and as a Department Head and Officer of the Deck, [he] had a duty to stop the book and the inappropriate behavior. He failed to do so. His accusation of [the AOO] as the "responsible officer" is outrageous and libelous. [The AOO] was a subordinate and Coast Guard Academy classmate of [his]. [The applicant's] attempt to shirk responsibility for his own actions further validates that he was not forthcoming with me about his knowledge of the book prior to me finding it and further validates the accurate evaluation of him.

The CO stated in her 20 years of active duty and tours on four cutters, the applicant's "performance, conduct, and lack of responsibility [are] some of the most disturbing and appalling I have ever witnessed." Regarding the OER marks for "Workplace Climate," "Judgment," and "Responsibility," she concluded that they were completely warranted based on his failure to stop the vulgar language and behavior and the documentation of the same in the quote book during the reporting period. Regarding the mark on the Comparison Scale, the CO wrote that "[i]rrespective of my discovery of the book, I would not have rated [the applicant] as an exceptional officer during this period. In his final marking period onboard and as a Department Head, [he] did not display the qualities that previously led me to rate him as exceptional compared to other officers of similar grade."

### ***JAG's Advisory Opinion***

The JAG stated that the applicant's rating chain violated the Personnel Manual when the CO directed the XO to assign the mark of 4 for "Workplace Climate," instead of the higher mark the XO wanted to assign. The JAG also noted that the evidence from the XO suggests that the applicant knew that the quote book had been removed from the bridge in 2008 and was unaware of its return. The JAG noted that there is no evidence that the applicant himself made any entries in the quote book after its return to the bridge. The JAG concluded, based on "the totality of the evidence," that the applicant has "met his burden of establishing 'legal error'" in the preparation of the disputed OER.

The JAG further stated that the applicant has made a prima facie showing of a causal nexus between the disputed OER and his non-selection for promotion. In this regard, the JAG noted that the OER is substantially worse than the applicant's two prior OERs received while serving on the cutter. Therefore, the JAG stated, "the conclusion can be reached that Applicant's record appeared worse due to the erroneous OER," and so the disputed OER "could have contributed substantially to his non-selection."

Therefore, the JAG recommended that the remove the OER from the applicant's record, replace it with a Continuity OER, remove his failure of selection for promotion in 2010 so that he will have two chances to compete for promotion with a corrected record, and backdate his date of rank, with back pay and allowances, if he is selected for promotion after the removal of the disputed OER.

### **APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On May 17, 2011, the applicant responded to the views of the Coast Guard. He stated that he agrees with the JAG's advisory opinion and disagrees with the PSC's memorandum. The applicant noted that the PSC relied heavily on his CO's affidavit and that "many of her statements are at odds with my recollection." The applicant stated that during the reporting period for the disputed OER no entries were "entered or initialed by myself or anyone on my bridge watch as I did not see the book during the period until the Commanding Officer read it to all members of the wardroom at an Officer's Call." The applicant noted that he was not standing watches during the specific period mentioned by the CO in April 2009, because he was serving as the Boarding Officer in their operations on the fishing vessel.<sup>7</sup> In addition, he alleged, he never condoned offensive language on the bridge. The applicant stated that he made no objections when he received the OER because he believed that making objections could not help and might worsen the OER. The applicant argued that his OER should be removed for the same reasons that LTJG X's was removed.

### **SUMMARY OF THE REGULATIONS**

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

Article 10.A.4.c.4. of the manual provides the following instructions for Supervisors completing the first 13 marks on an OER (similar instructions are provided for Reporting Officers for completing the last 5 marks 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. [Emphasis added.]

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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. [Emphasis added.]

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<sup>7</sup> According to a Coast Guard news release, the cutter intercepted a xxxxxx-flagged fishing vessel on April 7, 2009; sought and received permission from the xxxxxx government to board and search the vessel; found 2,200 pounds of cocaine on board; and escorted the vessel and its crew more than 500 miles before turning them over to xxxxxx authorities on April 13, 2009.

e. Comments should amplify and be consistent with the numerical evaluations. They should identify specific strengths and weaknesses in performance. ...

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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. ...

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.2.e.2.c. states that a reporting officer “[e]nsures the Supervisor fully meets responsibilities for administration of the OES [Officer Evaluation System]. 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 **shall not direct** that an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.)”

Article 10.A.4.f.11. states that in writing OER comments, rating chain members may not “[d]iscuss Reported-on Officer’s performance or conduct which occurred outside the reporting period.”

## FINDINGS AND CONCLUSIONS

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

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

2. The applicant asked the Board to correct or remove from his record his OER for the period February 1 to June 29, 2009, and also to expunge his non-selection for promotion to LT and award him back pay and allowances. The Board begins its analysis by presuming that a disputed OER in an applicant’s military record is correct and fair, and the applicant bears the burden of proving by a preponderance of the evidence that the OER is erroneous or unjust.<sup>8</sup> Absent specific evidence to the contrary, the Board presumes that the members of an applicant’s rating chain have acted “correctly, lawfully, and in good faith” in preparing their evaluations.<sup>9</sup> To be entitled to relief, the applicant cannot “merely allege or prove that an [OER] seems inaccu-

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<sup>8</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases, including disputes over OERs, prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>9</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

rate, incomplete or subjective in some sense,” but must prove that the disputed OER was adversely affected by a “misstatement of significant hard fact,” factors “which had no business being in the rating process,” or a prejudicial violation of a statute or regulation.<sup>10</sup>

3. The applicant has alleged and proved by a preponderance of the evidence that his mark for “Workplace Climate” in the disputed OER was prepared in violation of Article 10.A.2.e.2.c. of the Personnel Manual because his reporting officer, the CO, directed his supervisor, the XO, to assign him a lower mark than the XO thought should be assigned. The XO has executed a sworn statement admitting this fact, and the CO did not deny it.

4. The applicant alleged that the low and average marks and negative comments in the disputed OER are based on performance that occurred outside of the reporting period for the OER—February 1 to June 29, 2009. He alleged that before the CO brought the quote book to an Officer’s Call in April 2009, he had not seen it on the bridge since the summer of 2008 when another junior officer, the AOO, removed it because of the offensive content. Rating chain officials must base their marks and comments in an OER only on a reported-on officer’s performance during the reporting period, and they may not comment on “performance or conduct which occurred outside the reporting period.”<sup>11</sup> Therefore, if the applicant was unaware that the quote book had been returned to the bridge during the reporting period for the OER until after the CO discovered it, any marks and comments based on his involvement with the quote book were prohibited in his regular OER.<sup>12</sup> On the other hand, if the applicant was aware that the quote book had been returned to the bridge during the reporting period and failed to dispose of it or report it, then the CO was certainly entitled to base OER marks and comments on his lack of good judgment and responsibility in that regard, but not on his own contributions to the quote book, which were apparently all dated prior to the start of the reporting period.<sup>13</sup>

5. The PRRB has already determined that the low marks and comments in LTJG X’s OER for the period February 1 to May 28, 2009, were based on performance that occurred before the start of the reporting period because they were based on his involvement with the quote book. The PRRB held that once the AOO removed the quote book from the bridge in the summer of 2008, LTJG X could “rightfully assume[] the issue was resolved.” The applicant in this case was in essentially the same position as that of LTJG X with regard to the quote book: He knew that the AOO had taken the book from the bridge in the summer of 2008, and there is no hard evidence that he was aware that it had been returned to the bridge before the CO brought it to an Officer’s Call in April 2009. The CO clearly believes that the quote book was on the bridge throughout the reporting period for the disputed OER and that the applicant was aware of its presence there because he stood watches on the bridge. However, the CO herself remained igno-

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<sup>10</sup> *Hary v. United States*, 618 F.2d 704, 708 (Ct. Cl. 1980), cited in *Lindsay v. United States*, 295 F.3d 1252, 1259 (Fed. Cir. 2002).

<sup>11</sup> Personnel Manual, Articles 10.A.4.c. and 10.A.4.f.11.

<sup>12</sup> Poor performance discovered after the end of a reporting period is properly reported in an exception or special OER under Article 10.A.3.c. of the Personnel Manual, not a regular OER.

<sup>13</sup> The Board notes that the CO could have submitted copies of any pages of the quote book that contradicted his claims but did not.

rant of the quote book for almost a year after she took command of the cutter,<sup>14</sup> which supports the applicant's claim that the book was not stored on the bridge for most of that year as well as his claim that the book could have been returned to the bridge during the reporting period without his knowledge. The Board finds that the preponderance of the evidence shows that the quote book was not on the bridge in February and March 2009 and that it was returned to the bridge sometime in April 2009, shortly before the CO found it and during a period when the applicant was not standing watches on the bridge because he was serving as a boarding officer aboard a fishing vessel that was being driven to meet xxxxxx authorities. However, the low marks and negative comments in the applicant's disputed OER are clearly based on his involvement with the quote book. Therefore, he has proved by a preponderance of the evidence that some of the marks and comments in the disputed OER were based on performance that occurred outside of the reporting period, which is a violation of Articles 10.A.4.c. and 10.A.4.f.11. of the Personnel Manual.

6. Another junior officer who was involved with the quote book, LTJG X, has had his OER removed by the PRRB, whose decision was approved by the PSC, and the JAG and the PSC have unanimously recommended the removal of the OER of a third junior officer involved in the quote book in BCMR Docket No. 2011-082. The JAG has recommended removal of the OER in this case, too. Although the applicant held a higher position on the cutter than these other two junior officers and the CO was authorized to assign him marks as his reporting officer, the Board finds insufficient reason in the record to deny him the relief that has been granted to the other two.

7. The Board finds that the applicant has proved by a preponderance of the evidence that the disputed OER should be removed from his record because it was adversely affected by prejudicial violations of Articles 10.A.2.e.2.c., 10.A.4.c., and 10.A.4.f.11. of the Personnel Manual in that his reporting officer (a) directed his supervisor to assign a lower mark for "Workplace Climate" than the supervisor considered to be accurate and (b) based certain marks and comments at least in part on performance that occurred outside of the reporting period.<sup>15</sup> The applicant originally asked the Board to correct the OER by raising the disputed marks to 6s and removing the negative comments, but he has concurred with the alternative relief—removal of the entire OER—recommended by the JAG. Although the XO agreed that the marks should be raised, the CO has averred strongly that she would not have assigned the applicant a mark of 6 on the Comparison Scale for this reporting period even if the quote book had never been discovered. In BCMR Docket No. 151-87, the Board found that an OER should "not be ordered expunged unless the Board finds that the entire report is infected with the errors or injustices alleged; unless the Board finds that every significant comment in the report is incorrect or unjust; or unless the Board finds it impossible or impractical to sever the incorrect/unjust material from the appropriate material." In this case, it is not clear exactly how the discovery of the quote book affected the reporting officer's marks and comments in the disputed OER. Removing just the reporting officer's portion of the OER and raising the supervisor's mark for "Workplace Climate" would leave a half an OER in the applicant's record that might prejudice him further

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<sup>14</sup> The CO took command of the cutter in May 2008.

<sup>15</sup> See *Lindsay*, 295 F.3d at 1259.

before selection boards. Therefore, the Board finds that the OER should be removed from his record in its entirety and replaced with a Continuity OER.

8. The applicant asked the Board to remove his non-selection for promotion to LT in 2010 by the promotion year (PY) 2011 LT selection board because the erroneous OER was in his record when it was reviewed by that board. When an applicant proves that his military record contained an error or injustice when it was reviewed by a selection board, this Board must determine whether the applicant's non-selection for promotion should be removed by answering two questions: "First, was [the applicant's] record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that [the applicant] would have been promoted in any event?"<sup>16</sup> When an officer shows that his record was prejudiced before a selection board by error, "the end-burden of persuasion falls to the Government to show harmlessness—that, despite the plaintiff's *prima facie* case,<sup>[17]</sup> there was no substantial nexus or connection" between the prejudicial error and the non-selection for promotion.<sup>18</sup> To void a non-selection, the Board "need not find that the officer would in fact have actually been promoted in the absence of the error, but merely that promotion was not definitely unlikely or excluded."<sup>19</sup>

9. The applicant's record definitely appears worse because of the low and average marks and negative comments in the disputed OER. The mark of 3 for "Responsibility" is the only below-average mark he has ever received on an OER. His first OER while assigned to the cutter contains almost all marks of 5 and 6, and his second OER contains almost all marks of 6 and 7, so even the average marks of 4 on the disputed OER stand out as negative digressions. Therefore, the first prong of the *Engels* test is clearly met.

10. With regard to the second prong of the *Engels* test, the Board notes the very high marks in the applicant's other OERs and finds that it is not unlikely that the applicant would have been selected for promotion if the erroneous OER had not been in his record when it was reviewed by the PY 2011 LT selection board. Thus, the applicant has submitted *prima facie* evidence, and the Coast Guard has submitted nothing to rebut this evidence. Moreover, the JAG has admitted that the erroneous OER "could have contributed substantially to his non-selection." Therefore, the Board finds that the second prong of the *Engels* test is met, and the applicant's non-selection for promotion by the PY 2011 LT selection board should be removed from his record.

11. The applicant asked the Board to award him the back pay and allowances he lost as a result of his non-selection for promotion in 2010. The Board finds that if he is selected for promotion by the first LT selection board to review his record after it has been corrected, his LT date of rank should be backdated, once he has been promoted, to what it would have been had he

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<sup>16</sup> *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982).

<sup>17</sup> A "*prima facie* case" is one in which there is sufficient proof to support a finding in the plaintiff's favor if the evidence to the contrary is disregarded. BLACK'S LAW DICTIONARY, Rev'd 4<sup>th</sup> ed. (1968), p. 1353.

<sup>18</sup> *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003), citing *Engels*, 678 F.2d at 175; *Quinton*, 64 Fed. Cl. at 125.

<sup>19</sup> *Engels*, 678 F.2d at 175.

been selected for promotion in 2010 and he should receive corresponding back pay and allowances.

12. Accordingly, the relief described in findings 7, 10, and 11, above, should be granted.

**[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]**

