

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-064

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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 29, 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 September 8, 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, a retired lieutenant commander (LCDR), asked the Board to correct his record by removing an officer evaluation report (OER) covering his service as the Senior Investigating Officer and Chief of the Investigations Division for a Coast Guard Sector from May 1, 2008, through June 30, 2009. He asked the Board to replace the disputed OER with one prepared for continuity purposes only with an explanatory note about the lack of a substantive OER. He also asked the Board to remove his non-selections for promotion in 2009 and 2010, to remove the documentation of his retirement from his record, and to reinstate him on active duty.

The applicant alleged that the OER was prepared extremely late; that his first Supervisor during the evaluation period failed to provide a draft OER to his new Supervisor, who completed the OER; that the marks he received were caused by a poor command climate created by the commanding officer (CO) of the Sector; that the OER fails to show that he received a Commendation Medal; that the marks and comments in the disputed OER are inconsistent and inaccurate; and that the OER unjustly caused him to be passed over for promotion to commander (CDR).

Regarding the timing of the OER, the applicant alleged that he reminded his first Supervisor, who left the Sector in April 2009, that it was due at the end of April pursuant to Article 10.A.3.a.1.b(2) of the Personnel Manual. However, because of the poor command climate, his first Supervisor opted to transfer early and did not want to prepare the applicant's annual OER before he left. Instead, his first Supervisor "set the expectation" that the applicant's incoming

Supervisor would prepare a Detachment of Officer OER for the applicant when he left the Sector on June 30, 2009. The applicant stated that he also believes that his old Supervisor failed to provide a draft OER to his new Supervisor, as required by Article 10.A.2.d.2.j. of the Personnel Manual. Therefore, the applicant alleged, the disputed OER was prepared by an officer who had observed his performance for only two months, which was an inadequate time to evaluate his performance accurately and fairly. The applicant submitted documentation showing that he initiated his OER on June 26, 2009, and that as of July 14, 2009, the Personnel Service Center had not yet received the completed OER.

Regarding the command climate at the Sector and its effect on his OER, the applicant stated that “morale was very low and the CO had created an atmosphere of fear and mistrust. The CO regularly belittled and intimidated junior and senior officers as well as senior civilian employees for minor mistakes and frequently lost her temper. This irrational public treatment of officers created a dysfunctional command climate for officers and crew alike.” The applicant noted that the CO was relieved of command in April 2010 and that the poor command climate was cited as a reason.¹ The applicant alleged that the CO’s “prejudicial attitude that officers junior to her could not be trusted ... translated into lower performance marks on my OER that were a direct result of the personal and biased opinion. Her capricious attitude towards the [OER] submission schedule and content of my OER must be questioned.” The applicant complained that the CO failed in her responsibility to ensure that he received a timely and accurate OER even though he was up for promotion. The applicant alleged that the fact that he received “relatively mediocre marks” in comparison to the marks he had received on prior OERs should have caused the CO to return the OER to his Supervisor and Reporting Officer for further consideration and correction of inconsistencies and inaccuracies.

Regarding his Commendation Medal, the applicant stated that it was an end-of-tour award and that the CO initially approved only an Achievement Medal for him. However, the applicant requested reconsideration of the medal and submitted additional information “that reflected regional impact and sustained leadership.” The CO then raised the award to a Commendation Medal, but because the Commendation Medal was approved after the OER was submitted to Headquarters, it was not listed as an attachment on the OER. The applicant submitted emails showing that his CO apologized to Headquarters for the untimeliness of the applicant’s OER and forwarded the Commendation Medal to Headquarters on July 24, 2009. He also submitted a copy of a two-page email with the additional information reflecting regional impact and sustained leadership, which he submitted to support the higher award.

Regarding the alleged inconsistency and inaccuracy of the OER, the applicant stated that the laudatory comments in the OER support higher numerical marks. He submitted a copy of his four-page bulleted input describing his achievements for the OER and copies of his past and subsequent OERs, which contain somewhat higher marks. He argued that the laudatory comments on the certificate for his Commendation Award prove that his OER marks should have been higher.

¹ In support of this allegation, which is not disputed by the Coast Guard, the applicant submitted a news article about the CO’s relief for cause dated April 16, 2010. The article cites a poor command climate as one of the reasons for the CO’s relief.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard in 1986 and attended Officer Candidate School to receive his commission as an ensign in 1992. He was promoted to lieutenant junior grade in 1994, to lieutenant in 1997, and to lieutenant commander in 2003. The applicant's primary field was vessel inspections and investigations. From 2000 through 2006, the applicant was assigned to the Marine Safety Division of a Coast Guard District, where he served first as Chief of the Flag State/Port State Compliance Section and then as Chief of the Investigation/Analysis/Performance Section. He received excellent OERs with mostly marks of 6 and 7 in the performance categories² and marks in the fifth spot on the comparison scale.³ Upon his departure, he received a Commendation Medal for his service at the District from 2000 through 2006.

In 2006, the applicant was assigned to serve as the Senior Investigating Officer and Chief of the Investigations Division for a Coast Guard Sector. On his first OER at this assignment, dated April 30, 2007, the applicant received five marks of 5, eleven marks of 6, and two marks of 7 in the various performance categories and a mark in the fifth spot on the comparison scale. His Reporting Officer, the Deputy Sector Commander, "[h]ighly recommended [him] for promotion [with] best of peers." On his second OER at this assignment, dated April 30, 2008, the applicant received five marks of 5, twelve marks of 6, and one mark of 7 in the various performance categories and a mark in the fifth spot on the comparison scale. His Reporting Officer "[s]trongly recommended [him] for promotion to O-5 [CDR]." Despite these excellent OERs, the applicant was not selected for promotion to CDR in 2007 or 2008. Although twice failing of selection normally causes an officer's discharge or retirement, the applicant was selected for continuation on active duty as a LCDR through June 30, 2011.

The third and final OER that the applicant received at the Sector is the disputed OER in this case. Because of personnel transfers in the spring of 2008 and April 2009, it was prepared by an entirely new rating chain⁴ upon the applicant's own transfer from the Sector on June 30, 2009. The applicant received eight marks of 5 and ten marks of 6 in the various performance categories and another mark in the fifth spot on the comparison scale. More specifically, the applicant's new Supervisor, who arrived in April 2009, assigned him nine marks that were the same as the marks he had received on his 2008 OER, three marks that were one point lower, and one mark that was one point higher, while his Reporting Officer, who had served as the Deputy Sector Commander since May 1, 2008, assigned him three marks that were the same as the marks he had received on his 2008 OER, two marks that were one point lower, and the same comparison scale mark. The Reporting Officer wrote that the applicant "is an excellent perfor-

² 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.

³ 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 on the scale to a high of "Best officer of this grade" for a mark in the seventh spot. A mark in the fifth spot denotes an "excellent performer."

⁴ 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 the Supervisor's Supervisor, who completes the rest of the OER; and an OER Reviewer, who reviews the OER for consistency and comportment with regulations.

mer [with] the necessary technical expertise, management ability & leadership skills to be recommended for promotion to O-5.” The OER was completed on July 15, 2009, and does not show any medal attached.

On July 24, 2009, the Sector Commander awarded the applicant a Commendation Medal for his service at the Sector since 2006. The citation for the medal commends the applicant’s “highly accomplished managerial skills,” “substantial subject matter expertise,” “superior teamwork,” “insightful analysis,” and “exceptional professional competence.”

On July 28, 2009, the CDR selection board convened, but the applicant was passed over for promotion a third time. ALCGPSC 036/09, which announced the results of the selection board, shows that 114 of the 249 LCDRs in or above the zone for promotion were selected, including 61 percent of those in the zone and 27 percent of those above the zone.

On August 3, 2009, the applicant reported for duty to a different Sector office to serve as Chief of the Contingency Planning and Force Readiness Staff. On his OER dated April 30, 2010, the applicant received three marks of 5, thirteen marks of 6, and two marks of 7 in the various performance categories and a mark in the fifth spot on the comparison scale. His Reporting Officer wrote that he was “[h]ighly recommended for promotion to CDR.” This OER lists the applicant’s July 24, 2009, Commendation Medal as an attachment since it was awarded during the reporting period for this OER.

On July 27, 2010, the CDR selection board convened, but the applicant was passed over for promotion a fourth time. ALCGPSC 087/10, which announced the results of the selection board, shows that 135 of the 275 LCDRs in or above the zone for promotion were selected, including 69 percent of those in the zone and 17 percent of those above the zone.

On September 23, 2010, the applicant submitted a Request for Voluntary Retirement as of July 1, 2011. The Personnel Service Center approved his request and issued retirement orders.

VIEWS OF THE COAST GUARD

On May 13, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. In so doing, he adopted the findings and analysis provided in a memorandum on the case prepared by the Personnel Service Center (PSC).

The PSC stated that because the applicant was in or above the zone for promotion in 2009, his rating chain should have completed an annual OER dated April 30, 2009, instead of waiting to prepare the OER until his departure from the unit on June 30, 2009. However, the PSC stated, it is not clear whether the CO knew in April 2009 that the applicant was up for promotion, and the OER was not received from the command until July 21, 2009. The PSC stated that the OER was placed in the applicant’s record on July 23, 2009, before the CDR selection board convened on July 28, 2009. In addition, the Commendation Medal awarded on July 24, 2009, was received and placed in his record the same day, before the CDR selection board met. Therefore, both documents were in the applicant’s record when it was reviewed by the CDR

selection board. The PSC also noted that an officer is supposed to initiate his own OER by submitting his input 21 days before the end of the reporting period and that the applicant failed to submit his input until June 26, 2009.

The PSC submitted sworn declarations signed by the rating chain members, which are summarized below, and argued that the declarations show that the new Supervisor did seek and receive input—whether oral and/or written is unclear—from the first Supervisor before completing the disputed OER; that the CO did not influence the Supervisor and Reporting Officer in their preparation of the OER; and that all of the rating chain members maintain the OER’s accuracy.

Regarding the applicant’s allegation that the written comments supported higher marks, the PSC stated that the comments are consistent with the positive numerical marks and noted that the applicant did not file an OER Reply to be entered in his record with the OER. Regarding his allegation that the promotion recommendation is awkward, the PSC stated that Reporting Officers are expected to use their own judgment when writing comments about an officer’s potential for taking greater responsibility and leadership roles.

The PSC concluded that although the disputed OER was prepared two months after it should have been, it did not contain any substantive errors, was not influenced by the CO, and was present in the applicant’s record when it was reviewed by the CDR selection board that convened on July 29, 2009. Therefore, the PSC argued, the applicant has not proved that he was harmed by any error in the preparation of the OER. The PSC also disagreed with his claim that the disputed OER prevented his selection for promotion in 2009 because the applicant had already been passed over for promotion in 2007 and 2008 before the disputed OER was entered in his record.

Declaration of the Applicant’s Supervisor

The applicant’s Supervisor stated that he supervised the applicant from April 24 through June 30, 2009, and so personally prepared the marks and comments for the Supervisor’s portion of the disputed OER. However, before doing so, he contacted and communicated with the applicant’s first Supervisor to discuss the applicant’s performance. He stated that in his opinion, the applicant’s performance was “solid but not superlative” and he did not adjust his part of the OER in any way due to any influence by the CO.

The Supervisor agreed with the applicant that under the Personnel Manual, his OER should not have been delayed past April 30, 2009, and so his first Supervisor should have prepared it before his departure. He noted, however, that the OER was prepared in time to be reviewed by the CDR selection board in 2009.

Regarding the applicant’s end-of-tour medal, the Supervisor stated that he initially considered drafting the award for a Commendation Medal, but after consulting the applicant’s Reporting Officer, first Supervisor, and other senior civilian personnel who were familiar with the applicant’s performance, the Supervisor drafted the award for an Achievement Medal, which was approved by the regional Awards Board and then signed by the CO. However, after the

applicant protested the level of his medal and submitted documentation of previously undisclosed accomplishments during his tour of duty at the Sector, the award was revised to a Commendation Medal, which was entered into the applicant's record on July 24, 2009.

Regarding the command climate, the Supervisor stated that the applicant "may not have reached his full performance potential at [the Sector] due to the poor command climate which somewhat diminished his enthusiasm for the job." Nevertheless, the Supervisor stated that he believes that the disputed OER "captured [the applicant's] performance during the marking period."

Declaration of the Applicant's Reporting Officer

The Deputy Sector Commander served as the applicant's Reporting Officer from May 1, 2008, to June 30, 2009. The Reporting Officer, who assigned the applicant four marks of 5 and 1 mark of 6 in the performance categories and a mark in the fifth spot on the comparison scale in the disputed OER, stated that before completing the OER, he consulted the applicant's first Supervisor, new Supervisor, and a civilian employee about the applicant's performance. The Reporting Officer stated that "[d]ue to [the applicant's] slightly above average performance, I made the conscious decision to recommend him for O-5, but not strongly recommend him for that promotion." The Reporting Officer also wrote that he "stands by" the marks and comments in the OER. He stated that the OER was the work of the Supervisor and himself and was not influenced by the CO. He also claimed that the poor command climate that caused the CO to be relieved of command in 2010 was at the Sector/Deputy Sector Commander level only.

Regarding the lateness of the disputed OER, the Reporting Officer stated that while it could have been submitted earlier, his priority was to ensure that it was submitted in time for the CDR selection board, which it was.

Declaration of the CO

The CO, who served as the Reviewer for the disputed OER, stated that as an OER Reviewer, her role was to ensure that the marks assigned by the Supervisor and Reporting Officer were substantiated in the comments and appropriate. She did not direct them to lower any marks and she cannot recall making any comment to them about the applicant's OER. With regard to the applicant's actual performance, the CO stated that she can recall two private conversations she had with the applicant's Supervisor about

the apparent reluctance of [the applicant's] division personnel to respond to investigation reports per the Commandant's guidance. I also believe I mentioned during these discussions that [the applicant] did not seem involved in a leadership role within the unit, similar to other LCDRs, which surprised me based on his seniority. It should be noted that this OER reflected a complete change in the rating chain for [him] and slightly different marking perspectives would be expected.

The CO strongly disputed the applicant's claim that she was lackadaisical about his OER and medal. She stated that she had procedures in place to remind the Deputy and Department Heads to get evaluations in on time and that the Deputy Sector Commander routinely reminded the Department Heads to do so. When she realized that the applicant's OER was late, she

reminded his Supervisor about it. She noted that in July 2009, she personally interacted with the Officer Personnel Management Branch to ensure that the Commendation Medal was entered in the applicant's record before the CDR selection board convened. In addition, she noted that when she first received the award drafted for an Achievement Medal, she questioned the applicant's Supervisor and Reporting Officer about the level of the award, and both "recommended the Achievement Medal level to be consistent with the write up of the award and general award policies of the command." When the applicant challenged the level of his medal, she "attentively listened and openly agreed to his request for a resubmission." She gave his Supervisor only a short time to rewrite the award at the Commendation Medal level so that she would be able to get it in his record in time.

The CO stated that based on her knowledge of the applicant, his Supervisor, and his Reporting Officer and after reviewing all of the materials he submitted for his BCMR application, she "believe[s] the OER comments reflect and support the marks given and are consistent with [his] performance during the period."

JAG's Conclusions

The JAG noted that the PSC had admitted that the disputed OER should have been an annual OER dated April 30, 2009, instead of a detachment of officer OER dated June 30, 2009. Nevertheless, the JAG stated, "it is evident that the applicant's rating chain carried out their duties fairly and objectively by accurately marking the applicant in accordance with the Coast Guard Personnel Manual." The JAG noted that the declarations show that the disputed OER was "not influenced in any way by the Reviewer [the CO]." Therefore, the JAG concluded, the applicant has not proved that the marks and comments in the OER were adversely affected by any legal error. He alleged that the late preparation of the OER constitutes harmless error since lateness *per se* is not a prejudicial error.

The JAG argued that the applicant has not proved that any of the numerical marks or comments in the disputed OER are inaccurate. The JAG concurred with the PSC that even if one believed that the OER were erroneous or unjust, one could not conclude that the OER caused the applicant's non-selection for promotion in 2009 because the applicant had already been passed over for promotion in 2007 and 2008 and was passed over again in 2010. The JAG argued that since the applicant has not proved that his record was adversely affected by a misstatement of fact or a prejudicial violation of a regulation, there are no grounds for removing his non-selection for promotion.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 16 and 21, 2011, the Board received the applicant's responses to the views of the Coast Guard. The applicant repeated many of his allegations but primarily challenged his Reporting Officer's claim that the command climate problem existed only above the applicant's level. The applicant alleged that the Reporting Officer's claim is false and noted that his Supervisor admitted in his declaration that the poor command climate may have "somewhat diminished [the applicant's] enthusiasm for his job," and he alleged that a command climate survey

conducted at the Sector showed that the problem affected “not only the command cadre but had negative impacts on every member of the crew down to the deck plate level.”

To support his allegations about the command climate, the applicant submitted several work-related documents and described one incident in which he had a “heated exchange” with his first Supervisor in private. The applicant stated that in September 2008, this Supervisor asked him to obtain information that the CO wanted about a speed boat incident. The applicant “played devil’s advocate” and explained that the requested information was not relevant. However, his Supervisor directed him to continue trying to contact the speed boat owner “for the next two weeks at all hours.” The applicant responded that such persistence would border on harassment and that it would not be “a good use of my investigative resources.” When his Supervisor told him to do it anyway, the applicant responded, “Yes, sir.” The applicant said that there “may have been some dismay in my tone of voice,” and his Supervisor lost his temper. The applicant suggested that his Supervisor tell the CO to “come to me directly” for an explanation, but the Supervisor said that that “was not the way it worked” and was upset that the applicant seemed annoyed by the order. The applicant replied that he knew the military was not a democracy and that he would follow orders but that a subordinate does not have to “show blind enthusiasm for every order given by a superior.” The applicant stated that his Supervisor’s reaction was unprofessional and unwarranted “given that I would follow his orders.” The applicant concluded that his first Supervisor might “have developed a negative opinion of my performance ... due to the fact that the entire Prevention Department was micro-managed and criticized by [the CO], which may have caused him to take-it-out on his subordinates due to intolerable embarrassment, stress and frustration caused by the negative command climate.”

Also in 2008, the applicant stated, his division was offered “fall-out funds at the end of the fiscal year” by the District Prevention office. He accepted the funds because his division needed new scanners, but the CO instructed him to return the funds. The applicant attributed her decision to “mistrust and paranoia of [the District command]” because she “did not want to be beholden to them whatsoever.” In March 2009, the applicant alleged, after he described at a morning brief how a subordinate had investigated a fire on a tugboat, the CO criticized his decision-making “in front of the entire command cadre at the brief.” He alleged that the CO typically criticized and embarrassed subordinates in public and praised them in private. After the meeting, his Supervisor told him, “we are all in survival mode and we need to keep our heads down,” so he should contribute nothing at future staff briefs unless specifically requested to do so. Thereafter, the applicant spoke to the CO only when spoken to. Thus, the applicant alleged, the poor command climate suffered by his Supervisor also affected him and ultimately his OER.

Responding to the CO’s claim that she twice discussed the apparent reluctance of the applicant’s division to respond to investigation reports in accordance with policy, the applicant stated that “there were several instances whereby [the CO] directed my division to conduct recreational boating accident investigations in [a large lake and state waters].” The applicant stated that State and local agencies have the responsibility to respond to and investigate such accidents. He argued that “having my division, which was short-staffed due to retirements, medical issues and inexperienced personnel, conducting recreational boating accident investigations would be the equivalent of having the NTSB investigating a fender-bender involving private automobiles on a country road.” Moreover, assuming this issue was the basis for her discussions with his

Supervisor, his Supervisor never counseled him about it. Her criticisms in this regard “may also explain why [his first Supervisor] was developing a less than favorable opinion of my performance.”

The applicant argued that the Coast Guard’s claim that the CO did not influence the marks in the disputed OER is unrealistic because the CO prepared his Supervisor’s and Reporting Officer’s OERs. Moreover, he argued, the CO must have noted the inconsistencies between the disputed OER and his 2008 OER, which pursuant to Sector policy was a part of the package she reviewed as his OER Reviewer, and she should have returned the OER to his Supervisor and Reporting Officer because of the differences. She did not do so, the applicant alleged, because “[i]t was a foregone conclusion that I, as the Investigations Division Chief, would not receive a career enhancing OER that would strengthen my chances for promotion to O-5. Because of [the CO’s] prejudice regarding the Prevention Department, she would not carry out her OES [Officer Evaluation System] responsibilities as Reviewer and ask any questions regarding the [disputed OER] and allowed it to stand as written.”

Regarding the preparation of his OER, the applicant alleged that his first Supervisor told him that it should be a Detachment of Officer OER. After his first Supervisor assured him that the OER would still be entered in his record in time for the CDR selection board, despite the delay, the applicant “unwisely agreed to this so no waiver to extend this OER was sought” as provided in Article 10.A.3.b. of the Personnel Manual. The applicant stated that he “was not in a position to compel [his first Supervisor] to do an OER and it appeared that the command tacitly approved of this maneuvering” because his Reporting Officer and CO did not intervene and require them to initiate an OER. He also stated that, contrary to the PSC’s speculation, his CO was or should have been aware that he was up for promotion in 2009 because the CO and Reporting Officer personally informed him of his second non-selection for promotion in August 2008.

The applicant stated that the declarations of his rating chain prove that his first Supervisor failed to submit a draft OER for him, as required, and that his new Supervisor and Reporting Officer only discussed his performance with his first Supervisor orally. The applicant stated that, in the absence of a draft OER prepared by the first Supervisor, their discussions alone “could not construct an OER that was accurate, fair and objective.”

The applicant submitted a copy of the draft OER comments he submitted to his Supervisor on June 26, 2009, as well as his bulleted list of achievements. He noted that there are very few differences between the OER comments he wrote for himself and the OER comments that his new Supervisor included in his OER; indeed, most of the comments in the disputed OER are identical to those he drafted. The applicant stated that, as most reasonable people drafting their own OERs would do, he wrote the comments to support superb numerical marks, rather than the merely above-average marks he received. Therefore, the applicant argued, the marks and comments in the OER are clearly inconsistent with each other as the comments support higher marks. The applicant argued that if he truly deserved the marks assigned, the comments he drafted should have been significantly edited.

The applicant alleged that the disputed OER falsely indicates that his performance declined significantly during the evaluation period when in fact it did not decline at all and, if

anything, improved. If, as the rating chain alleged, his performance was declining, he argued, he was entitled to counseling. The applicant stated that it was unfair for his OER marks to decline because he was completing his tour of duty, had previously received progressively higher marks, and did not receive any official counseling during the evaluation period that his performance was perceived to be declining. The applicant noted that his 2010 OER was also much better than the disputed OER even though he was assigned to entirely new duties at a new command.

The applicant stated that he did not file an OER Reply because he was “exhausted by the negative command climate ... and my morale was at a low point after the Commendation Medal/Achievement Medal reconsideration.” In light of his rating chain’s declarations, he does not believe that filing an OER Reply would have helped his OER in any case.

The applicant argued that the fact that he was passed over for promotion in 2007 and 2008 is irrelevant to his application. He alleged that in the past some officers in his situation have ultimately been selected for promotion after having been non-selected multiple times. He argued that he has proved by a preponderance of the evidence that his 2009 OER was adversely affected by prejudicial errors and that, because it was in his record when it was reviewed by the CDR selection board in 2009 and 2010, those non-selections should be removed from his record and he should be reinstated and have more opportunities for selection for promotion.

SUMMARY OF THE REGULATIONS

Article 10.A.1.b.1. of the Personnel Manual in effect in 2009 states that COs “must ensure accurate, fair, and objective evaluations are provided to all officers under their command.”

Article 10.A.3.a. states that LCDRs normally receive an annual OER every April 30th but that the OER may be delayed up to 182 days if within that period another occasion for a regular OER arises, such as the LCDR’s departure from the unit or the departure of his Reporting Officer. However, Article 10.A.3.a.1.b.(2) states that “[t]hose officers above zone, and in zone, for promotion as specified by ALCGOFF promulgated by Commander (CGPC-opm) shall not delay their regular annual or semiannual OER past the scheduled due date.”

Article 10.A.2.c.2.d. states that an officer initiates his own OER by preparing the administrative data section and forwarding “the OER with proposed OER attachments to the Supervisor not later than 21 days before the end of the reporting period.” Article 10.A.2.d.2.i. states that the Supervisor “[i]nitiates an OER if the Reported-on Officer is unavailable, unable, or unwilling to perform in a timely manner [and] [f]orwards the OER, the OSF worksheet (if used or required), OER attachments, and any other relevant performance information to the Reporting Officer not later than 10 days after the end of the reporting period.”

Article 10.A.2.d.2.j. states that a departing Supervisor “[p]rovides the new Supervisor with a draft of OER sections (3-6) when the Supervisor changes during a reporting period. The draft may be handwritten and shall include marks and comments (bullet statements are acceptable) for the period of observation. It shall be prepared and signed by the departing Supervisor prior to departure.”

Article 10.A.4.c.4. 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.

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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.

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

• • •

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.4.c.9. states that in commenting on an officer's potential in block 10 of an OER, the Reporting Officer "shall comment on the Reported-on Officer's potential for greater leadership roles and responsibilities in the Coast Guard" and that these comments "may include, but are not limited to, the following: Qualification to assume the duties of the next grade. Specialties or types of assignment, such as command, for which the Reported-on Officer is qualified or shows aptitude. Recommendations for selection to a senior service school. Special talents or skills (or lack of) such as military readiness and warfare skills, seamanship or airmanship, etc., as applicable."

Article 10.A.4.c.3.a.(1) states that block 2 of an OER shall cite as an attachment any military decoration awarded during the evaluation period for the OER whether or not the achievement for which it was awarded occurred during the evaluation period.

Article 10.A.2.f.1.a. states that an OER "Reviewer ... has a definite OES administrative function and may perform an evaluative function." Article 10.A.2.f.2. states that the Reviewer "[e]nsures the OER reflects a reasonably consistent picture of the Reported-on Officer's performance and potential" and "[e]nsures the Supervisor and the Reporting Officer have adequately executed their responsibilities under the OES. The Reviewer shall return an OER to the Reporting Officer to correct errors, omissions, or inconsistencies between the numerical evaluation and

written comments. However, the Reviewer shall not direct in what manner an evaluation mark or comment be changed (unless the comment is prohibited under Article 10.A.4.f.).”

Regarding performance counseling, Article 10.A.1.b.2. states that “[i]ndividual officers are responsible for managing their performance. This responsibility entails determining job expectations, obtaining sufficient performance feedback, and using that information to meet or exceed standards.” Article 10.A.2.d.2.e. states that a Supervisor “[p]rovides timely performance feedback to the Reported-on Officer upon that officer’s request during the period, at the end of each reporting period and at such other times as the Supervisor deems appropriate.” Article 10.A.1.c.5. states that “[n]o specific form or forum is prescribed for performance feedback. Performance feedback occurs whenever a subordinate receives advice or observations related to their performance in any evaluation area. Performance feedback can take place formally (e.g., during a conference) or informally (e.g., through on-the-spot comments). Regardless of the forum, each officer should receive timely counseling and be clear about the feedback received. If the feedback is not fully understood, it is the Reported-on Officer’s responsibility to immediately seek clarification and the rating chain’s responsibility to provide it.”

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 remove from his record his OER for the period May 1, 2008, through June 30, 2009; to expunge his non-selections for promotion to CDR in 2009 and 2010; to expunge his retirement; and to reinstate him on active duty to allow him more chances to compete for promotion with a corrected record. 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.⁵ 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.⁶ To be entitled to relief, the applicant cannot “merely allege or prove that an [OER] seems inaccurate, 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.⁷

⁵ 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, first to the promulgation of the latter standard in 2003 in 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).

⁷ *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).

3. The applicant alleged that the disputed OER is erroneous because the evaluation period should have ended on April 30, 2009, instead of upon his detachment from the unit on June 30, 2009. The evaluation period for the OER should have ended on April 30, 2009, because the applicant was up for promotion that summer.⁸ However, the OER's delayed preparation, in and of itself, did not prejudice the applicant's record before the CDR selection board because the OER was entered in his record before that board convened on July 28, 2009. This Board has long held that delay *per se* is insufficient to justify removal of an otherwise valid OER.⁹

4. The applicant alleged that the OER's delayed preparation resulted in lower marks in the OER because it was prepared in part by his new Supervisor, rather than his prior Supervisor, who departed the unit in April 2009. The applicant's own statements and his delayed initiation of the OER on June 26, 2009, show, however, that he and his prior Supervisor discussed the timing of the OER and agreed to delay the OER until June 30, 2009, in violation of Article 10.A.3.a.1.b.(2). The Board notes that some officers opt for such delays, despite the regulation, so that as many achievements as possible can be noted in the OER before the officer's record is reviewed by the selection board and so that the OER might cite the officer's end-of-tour medal as an attachment.¹⁰

5. The applicant alleged that the disputed OER is inaccurate and based on just two months of the 14-month evaluation period because his prior Supervisor failed to provide his new Supervisor with a draft OER as required by Article 10.A.2.d.2.j. of the Personnel Manual. The record is unclear on this point, but it is clear from their declarations that both the new Supervisor and the Reporting Officer sought and received the prior Supervisor's input on the marks before preparing the disputed OER. The new Supervisor's marks in the disputed OER are very similar to those assigned in the applicant's prior OER: nine marks are identical, three marks are one point lower, and one mark is one point higher. Although the applicant alleged that his marks would have been higher had his prior Supervisor prepared the Supervisor's section of the OER, he also repeatedly admitted that his prior Supervisor's opinion of his performance had apparently declined during the evaluation period. Therefore and in light of the applicant's agreement that the OER be prepared by his new Supervisor upon his detachment from the unit, the Board finds that the applicant has not proved by a preponderance of the evidence that the disputed OER is inaccurate, erroneous, or unjust because of the proven violation of Article 10.A.3.a.1.b.(2) and the possible violation of Article 10.A.2.d.2.j. of the Personnel Manual.

6. The applicant alleged that his record was prejudiced before the CDR selection boards in 2009 and 2010 because the disputed OER did not show an attached end-of-tour medal. He alleged that the medal would have been an attachment to the OER if his Supervisor had properly recommended him for a Commendation Medal rather than an Achievement Medal. The applicant's new Supervisor stated that he originally considered drafting the award for a Commendation Medal but that, after consulting the prior Supervisor and others, he recommended the applicant for an Achievement Medal. The record further shows that the Achievement Medal was approved by the regional Awards Board and that the applicant ultimately received the Commen-

⁸ Personnel Manual, Article 10.A.3.a.1.b.(2).

⁹ See, e.g., CGBCMR Docket Nos. 2005-053, 2003-110, 2002-015, 43-98, 183-95 (Concurring Decision of the Deputy General Counsel Acting Under Delegated Authority), and 475-86.

¹⁰ See e.g., BCMR Docket No. 2007-027; Personnel Manual, Article 10.A.4.c.3.a.(1).

dation Medal only after he submitted additional information showing how his work reflected sustained leadership and a regional impact. Under these circumstances, the Board finds that the applicant has not proved by a preponderance of the evidence that the lack of a notation of the medal on the disputed OER constitutes an error or injustice. In this regard, the Board notes that the medal was not awarded until July 24, 2009, after the evaluation period for the disputed OER ended, and only those medals awarded during an evaluation period may be attached to an OER.¹¹ The medal is correctly listed as an attachment to the OER for the evaluation period that began on July 1, 2009. More importantly, as the CO's emails show, the Commendation Medal was entered in the applicant's record on July 24, 2009, before it was reviewed by the CDR selection board.

7. The applicant alleged that the disputed OER is inaccurate and should not have been approved by the CO because the marks are inconsistent with the comments and the citation for his Commendation Medal and with marks he has received on other OERs. The applicant has not submitted any evidence to show that the comments are inaccurate and admitted that he himself drafted the comments, most of which the rating chain adopted word for word. Not every accomplishment listed in the applicant's bulleted OER input appears in the OER, but space on an OER form is quite limited and the applicant presumably included the accomplishments he wanted to include when he drafted the comments. In arguing that the comments support higher marks, the applicant is misconstruing how an OER is prepared. As stated in Articles 10.A.4.c.4. and 10.A.4.c.7., rating officials do not assign marks based on the level of performance reflected in the comments. Instead, they read the performance standards for the marks printed on the OER form, assign marks by comparing the officer's performance to the written standards, and then include a written comment or two to support their decision to assign any mark other than a mark of 4. Moreover, contrary to the applicant's assertions, the Board finds that the OER comments are not so superlative that they are inconsistent with the assigned marks. While it is true that the applicant received higher marks in prior and subsequent OERs, the fact that an officer has "had better ratings before and after the challenged OER is of no legal moment nor of probative value as to the rating period covered by the one OER with which he is dissatisfied."¹² Nor does the laudatory language on the citation for the applicant's Commendation Medal, which was based on his performance throughout his tour at the Sector, persuade the Board that the numerical marks or comments in the disputed OER are inaccurate.

8. The applicant complained that the promotion recommendation in the disputed OER is awkward. The Reporting Officer's comment that the applicant "is an excellent performer [with] the necessary technical expertise, management ability & leadership skills to be recommended for promotion to O-5" is slightly indirect and thus lukewarm compared to more direct promotion recommendations stating that the officer is highly or strongly recommended for promotion. However, under Article 10.A.4.c.9. of the Personnel Manual, officers are not entitled to any particular promotion recommendation, and whether to include one at all is left to the discretion of the Reporting Officer. The applicant's Reporting Officer had served in that capacity throughout the evaluation period, and the recommendation that he opted to make after observing the applicant's performance for 14 months was not an abuse of his discretion.

¹¹ Personnel Manual, Article 10.A.4.c.3.a.(1).

¹² *Grieg v. United States*, 640 F.2d 1261, 1269 (Ct. Cl. 1981).

9. The applicant alleged that he received no counseling during the evaluation period and argued that he was entitled to counseling if his performance was deteriorating. However, the applicant's marks in the disputed OER are only slightly lower overall than in his prior OER, and his own statements show that he did receive feedback about his performance from time to time during the evaluation period. Article 10.A.1.c.5. of the Personnel Manual states that "[n]o specific form or forum is prescribed for performance feedback. 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)." The Board is not persuaded that the applicant was unjustly denied performance feedback during the evaluation period.

10. The applicant alleged that the CO was hostile and prejudiced against him because he was a member of the Prevention Department and that her hostility and prejudice caused his Supervisor and Reporting Officer to lower his marks in the disputed OER, in violation of Article 10.A.2.f.2. of the Personnel Manual, which states that the Reviewer "shall not direct in what manner an evaluation mark or comment be changed." However, the applicant has failed to submit evidence to prove that the CO was particularly hostile toward him or prejudiced against all the members of the Prevention Department, and both the Supervisor and Reporting Officer have strongly denied that the CO influenced the disputed OER. The fact that the CO served on the Supervisor's and Reporting Officer's rating chains is not persuasive of his claim given the absence of any evidence that the CO was prejudiced against him or instructed them to lower his marks.

11. The applicant alleged that the OER should be expunged because during the evaluation period he was subject to a hostile command climate, which caused his marks to be lower than they would have been in a less hostile working environment. As a military officer, the applicant is not protected from a hostile work environment under Title VII of the Civil Rights Act of 1964,¹³ and even if a civilian, he would not be protected unless he were alleging that the CO was prejudiced against him because of his gender, race, ethnicity, or religion, which he is not. However, Chapter 3.A.1.a. of the Equal Opportunity Manual states that every member of the Coast Guard deserves to be treated with honor, dignity, and respect, and it is theoretically possible that a CO could treat a subordinate so horribly that the subordinate could not reasonably be expected to perform his duties well even if the CO's abuse was not based on gender, race, ethnicity, or religion. Thus, the legal criteria for a hostile work environment are instructive as to the type of evidence needed to prove that a command climate is so abusive that a competent officer cannot reasonably be expected to perform his duties well. The caselaw on this issue shows that occasional hostile or humiliating words and actions are insufficient to prove a hostile work environment.¹⁴ Factors that courts consider, aside from bias, include the frequency of the conduct;

¹³ 42 U.S.C. § 2000e-16; see *Roper v. Dep't of the Army*, 832 F.2d 247, 248 (2nd Cir. 1987) (finding that "the *Feres* doctrine prevents members of the military from challenging military decisions through actions brought under Title VII"). However, "it is the Coast Guard's policy to apply the same protections [in Title VII] to the military workforce." Equal Opportunity Manual, Chap. 3.A.5.b. "To meet the definition of a hostile environment, the harassment must be so severe and pervasive that a reasonable person would view the environment as hostile, offensive, or abusive." *Id.* at Chap. 3.A.5.d.

¹⁴ See *Overton v. New York State Division of Military and Naval Affairs*, 373 F.3d 83, 99 (2nd Cir. 2004) (Pooler, J., concurring) (noting that a handful of racist comments spread out over several years was insufficient to create a "hostile work environment").

the severity of the conduct; whether the conduct is physically threatening or humiliating or merely offensive; and whether the conduct unreasonably interfered with an employee's work performance.¹⁵ A hostile work environment in the civilian sector exists "[w]hen the workplace is permeated with 'discriminatory intimidation ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"¹⁶

12. The only evidence supporting the applicant's claim that his OER is unjust and should be removed because of a hostile command climate is the fact that the CO was relieved for cause in part because of a poor command climate in April 2010; his Reporting Officer's contention that a poor command climate existed but did not affect the applicant; and his new Supervisor's statement that the applicant "may not have reached his full performance potential at [the Sector] due to the poor command climate which somewhat diminished his enthusiasm for the job." Even assuming the verity of the applicant's claim that the CO criticized his decision-making about the investigation of a tugboat fire "in front of the entire command cadre at the brief," the Board finds the evidence of record to be considerably inadequate to prove that the command climate was so hostile that he could not have performed his duties to meet the standards for higher OER marks.

13. In light of the above findings, the Board finds that the applicant has not proved by a preponderance of the evidence 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.¹⁷ The Board finds no basis for removing the disputed OER.

14. The applicant made numerous allegations with respect to the actions and attitudes of his rating chain. Those allegations not specifically addressed above are considered to be unproven and/or not dispositive of the case.¹⁸

15. The applicant asked the Board to remove his non-selections for promotion in 2009 and 2010, void his voluntary retirement, and reinstate him on active duty. The Board finds no grounds for awarding such relief because the applicant has not proved by a preponderance of the evidence that his military record was prejudiced by any error or injustice when it was reviewed by the CDR selection boards in 2009 and 2010.¹⁹

16. Accordingly, the application should be denied.

¹⁵ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

¹⁶ *Id.* (citations omitted).

¹⁷ *Hary*, 618 F.2d at 708; *Lindsay*, 295 F.3d at 1259.

¹⁸ See *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) (noting that the Board need not address arguments that "appear frivolous on their face and could [not] affect the Board's ultimate disposition").

¹⁹ *Engels v. United States*, 678 F.2d 173, 175-76 (Ct. Cl. 1982) (noting that before the BCMR removes a non-selection for promotion from an officer's record, it should first determine that the officer's record appeared worse because of a prejudicial error and then determine that if no error had prejudiced the officer's record, it is not unlikely that the officer would have been promoted).

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCG (Retired), for correction of his military record is denied.

Julia Andrews

Robert S. Johnson, Jr.

James H. Martin